Supreme Court U.S.
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Nº. 02 1570 APR 25 2003

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In The Supreme Court of the United States

NANCY E. COTTER; ET AL.,
Petitioner,
v.
TED AUSTIN BURKHALTER; ET AL.,
Respondent.

Petition For A Writ Of Certiorari To The Supreme Court of Tennessee

PETITION FOR A WRIT OF CERTIORARI
with Appendix

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April, 2003

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114 pp

Question Presented For Review

When a state's appellate courts render decision on the bases of clearly fictitious assumptions of fact not derived from credibility determinations, coupled with the disregard of the well-established governing bodies of state law invoked in briefing, and its appellate judiciary refuses to take notice of and to correct such mistakes properly called to its attention under state procedures expressly provided therefor, does such constitute a taking of property and rights without due process of law, contrary to the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States?

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Statutes cited:

Constitution of the United States, 14th Amendment,
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Rules cited:

Rule 39(a)(1) T.R.App.P 5,

Other Authorities:

Blackstone, Commentaries § 197, pp. 141,142
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Parties to the Proceedings

The names of all parties appear in the caption, and Petitioner is a natural person without parent or subsidiary corporations, so no Rule 29.6 disclosure is required.

Opinions Below

The appellate decisions are reported as *Cotter v. Burkhalter, et al.*, 2002 Tenn. App. LEXIS 310 (Tenn. App., M.S, April 30, 2002), *Cotter v. Burkhalter, et al.*, 2002 Tenn. LEXIS 593 (Tenn., December 2, 2002), *Reh. Den.*, 2003 Tenn. LEXIS 40 (Tenn., January 27, 2003) and *Cotter v. Burkhalter, et al.*, 2002 WL 772581 (Tenn.Ct.App., April 30, 2002, *App. Den* Dec. 2, 2002, *Reh. Den.*, Jan. 27, 2003).

Statement of Jurisdiction

(I) The order of the Supreme Court of Tennessee was entered December 2, 2002, denying application for permission to appeal, and the order denying rehearing thereof was entered January 27, 2003, which order imparted finality to the Opinion and Decision of the Tennessee Court of Appeals rendered April 30, 2002.

(ii) The statutory provision believed to confer on this Court jurisdiction to review the judgment and orders in question is 28 U.S.C. Sec. 1257.

Constitutional and Statutory Provisions

Constitution of the United States, Fourteenth Amendment, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 1257

> **§ 1257. State courts; certiorari**
> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.
>
> (b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

Statement of the Case

The case originated as an action determinable wholly by well-developed bodies of Tennessee state law,[1] brought by a trustee of an *inter vivos* trust, who was also a trust beneficiary and named executrix of the settlor's estate, against one who was her former co-trustee as well as accountant and attorney for the trust and the estate, for diversion of trust funds (the defendant co-trustee admitted receiving the trust funds, but claimed the plaintiff knew about and consented to this as an investment) and accounting malpractice relating to estate taxation. It made claims against other defendants alleged to have incurred liability in diminishing the trust's assets.[2]

After an evidentiary bench trial against the co-trustee and his partner in a partnership into which he had channeled much of the trust money he received, the Chancellor dismissed on the ground of judicial estoppel, which prevented decision of the diversion and related claims on their merits. By interlocutory orders, the Chancellor had previously entered orders sustaining other defendants' cross-motions for

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[1]Including the law of Trusts, commercial paper, professional accountant malpractice, fiduciary status, and *stare decisis.*

[2] These included the co-trustee's accounting firm, a securities firm holding the trust's assets which made the diversions possible by honoring its own checks not endorsed by the payee Trust, and a separate partnership of the co-trustee into which diverted funds were channeled.

summary judgment, these, also, on legal grounds that precluded determination of liability issues on their merits. The order sustaining the defensive summary judgement motions rendered it unnecessary, at that stage, to rule upon Petitioner's motions for summary judgment on claims against those same defendants.

Appeal of right was taken to the Tennessee Court of Appeals, where by law, review of bench trial decisions is *de novo* without deference except for credibility decisions to a limited degree[3] and interlocutory summary judgment decisions are reviewable as pure issues of law. Hence, Petitioner sought review first, of the actual decisions, and if favorable, review *de novo* and decision on the merits of claims against each defendant, which had not been reached by the Chancery Court.

Petitioner thoroughly briefed the law governing each of the issues in the Court of Appeals, on the merits and on the issues, later labeled "blocking issues," on which decisions had prevented decisions on the merits. These bodies of law included:

(i) As to judicial estoppel, the quality of unexplained false swearing to conflicting facts in prior judicial proceedings (which Petitioner insists never occurred, as a matter of law from the words of the document);

(ii) Further as to judicial estoppel, the law of statutory

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[3] *Realty Shop v. Westminister Holding, Inc.*, 7 S.W.3d 581, at 596 (Tenn. App., M.S., 1999, App. den. 1999).

construction as to an amendment to Tennessee's civil procedural rules, whose plain language and declared intent was to abolish the defense of judicial estoppel, and the law of *stare decisis* explaining why the efficacy of the rule change to achieve that purpose was not undermined by a later appellate decision which took no notice of either the rule or its amendment;

(iii) The law of construction of instruments as to the trust instrument and the security firm's printed forms as blocking decision on the merits of its liability for failing to safeguard the trust funds against diversion; and

(iv) As to malpractice liability, whether the quality of an Internal Revenue Service communication and the lawyer to whom it was made sufficed to start the running of the statute of limitations, when the lawyer represented the administrator of the settlor's estate and never represented Petitioner, co-trustee of the Trust, the Trust being primarily liable for all estate taxes both by statute and trust instrument provisions.

In its decision (App. B2-B55), the Court of Appeals refused to reach the merits of any of the claims by affirming the Chancellor's action of sustaining each of the "blocking defenses." The Court achieved this by misstating important facts in its opinion, and by failing to apply, as to any point, the applicable body of state law, though each was thoroughly briefed by Petitioner. These errors were called to that Court's attention by petition for rehearing which insisted that construction of the unique language of Rule 39(a)(1),

Tennessee Rules of Appellate Procedure, [4] obligates the appellate court to correct such errors. The Court denied the rehearing petition by a substantive order which neither defended the Opinion's misstatements of facts nor stated that the Opinion had followed the controlling bodies of Tennessee law (App. B1).

Asserting that such mode of appellate adjudication was a deprivation of property and rights contrary to the law of the land, in violation of such provision of the Constitution of Tennessee, and was a deprivation without due process of law in violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, Petitioner sought to appeal to the Supreme Court of Tennessee by Application for Permission to Appeal which quoted the most pertinent parts of the Petition for Rehearing in the Court of Appeals (App. A15–A44). The Application to Appeal was denied, as was the Petition to Rehear that denial, each by *pro forma* order without rationale stated (App. A14, A1).

The assertion that the decision by the Court of Appeals violated the Due Process Clause of the Fourteenth Amendment was made to the Supreme Court of Tennessee in those filings.

Specific quotations from the Application for Permission to Appeal include:

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[4] As an example of grounds for rehearing, this rule suggests "(1) the court's opinion incorrectly states the material facts established by the evidence as set forth in the record; . . ."

"Plaintiff-Applicant insists that such strong language [of Rule 39(a), T.R. App .P] was adopted in furtherance of constitutional mandates that the decision of litigation taking (or refusing to protect) property or rights may be done only as permitted by the "law of the Land", Constitution of Tennessee, Art. I, § 10, and Art. XI, § 16, or in the more modern phrase, by Due Process of Law, Constitution of the United States, Fourteenth Amendment."
(App. A21)

"Finally, with both Courts below having failed to apply controlling law, this case will have achieved the destruction of Mrs. Cotter's valuable rights contrary to the Law of the Land, as protected by the Constitution of Tennessee, and to Due Process of Law, in violation of the Fourteenth Amendment to the Constitution of the United States, unless this Court shall grant the appeal, and assure that the case shall be decided upon the law and the facts, both determined as the law directs."
(App. A44)

Specific quotations from the Petition for Rehearing of the Tennessee Supreme Court's denial of the Application for Permission to Appeal are:

"If Plaintiff and her counsel are right in their sincere belief that unsupported false assumptions are the basis and means by which her valuable property and rights have been sacrificed by the State of Tennessee—for action by a state's judiciary is action by the state itself, *Shelley v. Kraemer,* 334 U.S. 1, 68 S. Ct.

836, 92 L. Ed. 1161 (1948) [footnoted quotation omitted]—then Tennessee is without power to correct this error except through the individual exercise of discretion by each member of this Court in recognizing the obligation to review the details of whether judicial power was abused herein."

(App. A5)

"Therefore, as insisted in the Application for Permission to Appeal, unless this Court shall accept the appeal and actually review the decisions herein, Mrs. Cotter's valuable rights will stand judicially destroyed, contrary to the Law of the Land, as protected by the Constitution of Tennessee, and to Due Process of Law, in violation of the Fourteenth Amendment to the Constitution of the United States. Petitioner respectfully suggests that the quality the United States Supreme Court has called "the imperative of judicial integrity" [footnoted citations omitted] should impel each member of this Court to grant the Petition for Rehearing and the Application for Permission to Appeal."

(App A10-A11)

Reasons for Granting the Writ

As this Court revisited the core meaning of the legal concept that a defendant's physical presence within a state vested the state with the power to adjudicate, *Burnham v. Superior Court of California,* 495 U.S. 604, 110 S.Ct. 2105, 109 L.Ed.2d 631 (1990), so this case calls for revisiting the core meaning of the concept of due process of law as protected by the Due Processes Clauses of the Constitution of the United States.

Such would represent a return, not an innovation. Blackstone's language simply assumed that any reader would know from context that "due process" refers to the law of the land which every judge is obligated to follow in depriving persons of life, liberty or property:

> "It were endless to enumerate all the *affirmative* acts of parliament, wherein justice is directed to be done according to the law of the land; and what that law is, every subject knows, or may know, if he pleases; for it depends not upon the arbitrary will of any judge; but is permanent, fixed, and unchangeable, unless by the authority of parliament."

I BLACKSTONE, COMMENTARIES § 197, "The Courts: due process of law", pp.*141-*142 (Jones ed., 1915).

One of the earliest applications of the Fourteenth Amendment's Due Process prohibition concerned the substantive content not merely of the state law of New York, but a part of that law in the state's constitution, albeit in language identical to that of the Cruel and Unusual Punishment Clause of the Eighth Amendment to the Constitution of the United States, *In re Kemmler,* 136 U.S. 436; 10 S. Ct. 930; 34 L. Ed. 519 (1890).

It was clearly recognized that "due process of law," as applied by the Fourteenth Amendment to any state, refers to the "law of the land" of that state, *Twining v. New Jersey,* 211 U.S. 78, 29 S.Ct. 14, 53 L.Ed. 97 (1908), quoting with approval: "The same words refer to that law of the land in each State, which derives its authority from the inherent and reserved powers of the State, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." (211 U.S., at 101, 29 S.Ct., at 21, 53 L.Ed., at 107).

With reference to this Court's Rule 10, the decision of Tennessee's court of last resort herein, giving finality to the opinion of the Tennessee Court of Appeals, violates these most basic requirements of due process of law.

The purpose and purport of every appellate judicial opinion is to demonstrate the substance of the law that dictated the decision, with sufficient facts to identify that body of law as controlling. It does not diminish or question the value or legitimacy that has been added to the concept of

due process of law by judicial opinions, to insist that when courts utterly depart from well-established governing law—as differentiated from consciously distinguishing, modifying, or overruling past authorities where justified—this is an egregious denial of due process of law.

It must be within the power of this Court to remedy such state judicial violations of the Fourteenth Amendment without intruding into the state judicial discretion, particularly as that discretion was explained by Chief Justice Marshall in *Osborn v. Bank of the United States,* 22 U.S. 738; 6 L. Ed. 204 (1824) (quoted to the Supreme Court of Tennessee, *infra,* App., A5, n. 3).

The extensiveness of this type of violation of one of the Due Process Clauses could never be determined except by comparing each decision with that case's entire record, or at least with all the appellate briefs. But from its nature, this type of violation of the due process prohibitions can occur either within a state's or the Federal appellate judiciary. It *has* happened in both systems.

When, as here, an appellant thoroughly explores the controlling decisions on a sizeable number of legal points, and no attempt is made—either by opposing counsel in briefs or by the deciding appellate courts—to demonstrate error in such expositions, this appears totally incompatible with the requirements of the core meaning of due process of law. The most likely explanation is that the appellate opinion was

written as an attempt to justify the decision, instead of setting out the legal rationale which mandates the decision.

In such a case, it is believed that a brief summary of the historical steps by which "due process of law" gained valuable added meanings through judicial construction, will help highlight the core meaning of that concept, which must remain intact. This core meaning of "due process of law" is what the phrase was understood to mean when those words were written by Sir William Blackstone, by James Madison, and by Congressman Bingham.

It is needful that there be a Twenty-first Century exposition of the core meaning of due process of law. This case presents an excellent vehicle for such exploration, in that its most important facts are embedded in legal instruments—the words of an oath, of trust instrument provisions, of protective documents drawn by brokerage firms, of legislated statutes and rules. Those meanings are dug out by analytical examination of writings, which is the sole province of the judiciary under Tennessee law as within the Federal system. This is a case in which the issue should be determinable by inspection only of the relevant legal instruments and the briefs filed by all parties in the Tennessee Court of Appeals, without requiring resort to the trial transcript.

Moreover, there is real need for the writ's remedy in this case, because of Petitioner's firm belief that her rights have been destroyed by actions of Tennessee, through its

appellate judiciary, in violating the Due Process Clause of the Fourteenth Amendment and then by intentionally and deliberately refusing to undo that violation, causing Petitioner a loss in the hundreds of thousands of dollars.

WHEREFORE, Petitioners respectfully pray that the Writ of Certiorari issue to the Supreme Court of Tennessee and, if necessary, to the Tennessee Court of Appeals for the Middle Section, in Nashville, as the repository of the entire appellate record.[5]

Respectfully submitted,

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[5]The important documents in the Tennessee Supreme Court record are the Supreme Court filings printed in the Appendix, Appellee responses to Petitioner's Application for Permission to Appeal, and Petitioner's Tennessee Supreme Court Brief on the merits of the entire appeal, filed simultaneously with the Application for Permission to Appeal, which may alone be sufficient for this Court's narrow review.

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SUPREME COURT OF TENNESSEE FILINGS:

Order [Denying Permission to Appeal],
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Petition For Rehearing,
filed 12/12/02 ..... A2-A13

Order [Denying Permission to Appeal],
filed 12/2/02 ..... A14-A14

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Memorandum Opinion,
filed 10/3/2000 ..... C1-C7

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filed 1/31/2001 ..... C8-C10

IN THE

Supreme Court of Tennessee,

AT NASHVILLE

NANCY E. COTTER,
Plaintiff,
v.

TED AUSTIN BURKHALTER, ET AL.,
Defendant.

No. M2000-03183-SC-R11-CV

Order

Upon consideration of Nancy Cotter's petition to rehear the December 2, 2002 order denying her application for permission to appeal, the petition is DENIED.

PER CURIAM

FILED
JAN 2 7 2003
Clerk of the Courts
Rec'd By

IN THE

Supreme Court of Tennessee,

AT NASHVILLE

NANCY E. COTTER, Individually, And As TRUSTEE Of THE VERLA DOYLE FAMILY TRUST,	)	**Case No. M2000 -03183- SC-R11- CV**
Plaintiff-Appellant,	)	
v.	)	
TED AUSTIN BURKHALTER, PRUDENTIAL SECURITIES, INC.; BURKHALTER RYAN CO., P.C.; LINDA L. RESHA and NABTS, A PARTNERSHIP OF LINDA L. RESHA AND TED A. BURKHALTER,	)	**Court of Appeals No. M2000-03183- COA-R3-CV**
Defendants-Appellees.	)	**Davidson Co. Chancery 97- 1181-I**

FILED
Dec 12 2002

Clerk of the Court

PLAINTIFF–APPELLANT'S PETITION FOR REHEARING OF THE ORDER OF DECEMBER 2, 2002, DENYING THE APPLICATION FOR PERMISSION TO APPEAL

Plaintiff-Appellant respectfully petitions the Court, as authorized by Rule 39, T.R. App. P., to rehear or reconsider its Order denying her Application for Permission to Appeal for the reasons set out herein. This has to be done with knowledge that this Court "generally disfavors petitions to rehear following denials of applications for permission to appeal." (Advisory Commission Comment to 1996 Amendment). The rule nevertheless reserves the right to submit such a petition whenever counsel believes it warranted.

Although the probabilities of any such petition's rejection are overwhelming,[1] Appellant must be emboldened to ask because the continuing refusal to review this record would be fundamentally wrong and contrary to the obligation of the judiciary

to try to assure that every decision will be in accordance with law.

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[1]This is true because it requires three members of the Court to grant this petition, Rule 39(e), T.R.App.P., while only two members could grant the permission to appeal, Rule 11(e), T.R.App.P., even apart from the traditional propensity of every human mind against reconsidering its past decisions.

If and when the Court shall overrule this petition, the record in this case will be closed, beyond the power of the Government of Tennessee to change any part of it. If such shall occur, then if any impartial scholar shall study the briefs and compare them against the record, whether that examiner be an interested citizen, a student of the judicial processes, or in a poet's phrase, "whatever gods there be,"[2] such scholar is bound to conclude that Tennessee's judicial powers, through all levels of its judicial system, have deprived Plaintiff of her right to the just resolution of her disputed claims by the courts' incorrect declaration or acceptance of falsehoods, as if they were truth, as bases of decision of this case.

It is indisputable that, from merely reading a statement conclusory in nature, no human mind can determine whether the statement is a conclusion or only a factual assumption. The only possible way any mind can differentiate between the two is to thoughtfully examine the reasoning claimed to lead to the conclusion. In this case, this petitioner has given facts and the reasoning proving the truth and her opposition has presented only assumptions with no reasoning proving their correctness. On no dispositive point has either the opposition or any judicial opinion sought to show any error in Plaintiff's rationale

The improvement of DNA analysis has produced many cases from the past in which judgments of guilt have been proven false, and the innocent have been freed, because the core objective of every judicial proceeding is to determine and declare the truth. Those cases present errors by the finders of fact, founded upon determinations of credibility. But the construction and analysis of documents is the exclusive

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[2]William Ernest Henley, "Invictus."

province of the judiciary, and when false factual assumptions about documentary provisions are the basis of judicial decisions, the error is that of the judiciary alone, and it is an error the judiciary is obligated to correct.

If Plaintiff and her counsel are right in their sincere belief that unsupported false assumptions are the basis and means by which her valuable property and rights have been sacrificed by the State of Tennessee—for action by a state's judiciary is action by the state itself, *Shelley v. Kraemer,* 334 U.S. 1, 68 S. Ct. 836, 92 L. Ed. 1161 (1948)[3] —then Tennessee is without power to correct this error except through the individual exercise of discretion by each member of this Court in recognizing the obligation to review the details of whether judicial power was abused herein.

Each individual judge's exercise of judicial discretion requires something more than a reaction to a questioned opinion as gratifying, satisfactory, or troublesome, without any inquiry into the truth of assumptions made by the opinion. Judicial discretion was best and most accurately described by our country's greatest jurist, Chief Justice John Marshall, in *Osborn v. Bank of the United States,* 22 U.S. 738, 6 L. Ed. 204 (1824):

"Judicial power, as contradistinguished from the

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[3]"That the action of state courts and judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of this Court." (334 U.S., at 14, 64 S.Ct., at 842, 92 L.Ed., at 1181).

> power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, *a discretion to be exercised in discerning the course prescribed by law;* and, when that is discerned, *it is the duty of the Court to follow it.* Judicial power is never exericised for the purpose of giving effect to the will of the Judge; always for the purpose of giving effect to the will of the Legislature; or, in other words, to the will of the law."
> (22 U.S. at 866, 6 L.Ed. at 234; emphasis added.)

In determining truth, no judge can simply compare conflicting assumptions in opposing counsels' briefs for compatibility with his or her philosophy. This is particularly indisputable under the unique circumstances here presented—*(i)* truth or falsity of assumptions cannot be determined except by applying reason to documentary evidence through thoughtful study; *(ii)* Plaintiff has presented detailed reasoning[4] why each assumption is unwarranted or false; *(iii)*

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[4]By "reasoning," this writer means actual meticulous reasoning from basic and secondary premises to conclusion through the use of logic, with the conclusion itself then qualifying for use as a basic or secondary premise. As an example, we, as people professionally required to be learned in **law,** unquestioningly accept as true Pythagorous' theorum on the relation between the

no defendant has pointed to any defect in this reasoning nor asserted any inaccuracy in the factual evidence upon which the inferences are based; and *(iv)* no opponent has submitted any step-by-step reasoning to establish that opponent's assumptions which Appellant declares untrue. Faced by such a situation, there is no way any court can determine which position is correct except by examining the reasoning underlying each of the opposing positions. That has yet occur in this case, either in defensive briefs or in judicial opinions.

To recapitulate, the following are the underpinnings of the exercise of judicial power destroying Plaintiff's rights which have not yet received the benefit of actual judicial analysis:

- The assumption that Mrs. Cotter executed a false affidavit in judicial proceedings is itself a falsehood.

- The assumption that Mrs. Cotter swore to the

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sides and the hypotenuse of a right triangle, which is the basis of all trigonometry and calculus, but no mathemetician would accept the theorum on faith. The mathematician would have to carefully follow in his own mind each rational step by which Pythagorous proved his theorum.

accuracy of a Burkhalter-prepared trust accounting (not the estate accounting) *in any court* is a falsehood.

- The intermediate appellate court's conclusion (Opinion, pp. 9-10) that the amended last sentence to Rule 803(1.2), T.R.Evidence, did not abolish Tennessee's doctrine of judicial estoppel by oath as creating a conclusive presumption (which common-law doctrine is contrary to the Rule's plain language and to its stated purpose as declared by its framers) was a conclusion not arrived at by application of *any* of the rules of statutory construction. It was not supported by the mere fact that this Court applied the doctrine of judicial estoppel by oath in *Marcus v. Marcus,* 993 S.W.2d 596, 601 (Tenn., 1999), decided after the rule's amendment, because *Marcus* admittedly did not construe or apply Rule 803.

- The implicit assumption that Cotter was represented by an attorney who received information from the Internal Revenue Service so as to be imputable to her, for statute of limitations purposes, is false: The attorney who received such communication **never** represented her, but represented a different principal, the estate's administrator, Judge Loser. Mrs. Cotter

and the trust of which she was co-trustee were represented by a different lawyer who received no such knowledge, and the trust—not the estate—was liable for and actually paid all estate taxes both under the terms of the trust instrument and under the controlling statute. Hence, there was no factual basis for applying *Kohl v. Dearborn & Ewing*, 977 S.W.2d (Tenn. 1998) hereto, to hold her malpractice claim against Mr. Burkhalter barred by the statute of limitations. *Kohl's* imapplicability to a non-agency relation, even if it were not obvious, has already been established by *Caledonia Leasing and Equipment Co., Inc. v. Armstrong, Allen, Braden, Goodman, Mcbride & Prewitt,* 865 S.W.2d 10 (Tenn.App., W.S., 1992, App.den. 1993).

- Assumptions that provisions of the Trust Instrument and Prudential's account documents shield Prudential from liability are false, because the basis of its liability for most of the money Prudential allowed to be diverted was its acceptance of checks not endorsed by the payee, "The Verla D. Doyle Family Trust," as charges against *its own bank accoount,* which it then passed on to the Trust's investment account. The scope of authority of each trustee is rationally irrelevant to this ground of liability. To the limited

extent that the Trust instrument and Prudential's account documents were relevant, the law on the construction of instruments does not possibly permit them to be construed as Prudential assumes, as demonstrated by the Plaintiff's brief filed in this Court. The law of construction of instruments was not used in judicial opinions herein to justify acceptance of Prudential's defensive assumptions.

Therefore, as insisted in the Application for Permission to Appeal, unless this Court shall accept the appeal and actually review the decisions herein, Mrs. Cotter's valuable rights will stand judicially destroyed, contrary to the Law of the Land, as protected by the Constitution of Tennessee, and to Due Process of Law, in violation of the Fourteenth Amendment to the Constitution of the United States. Petitioner respectfully suggests that the quality the United States Supreme Court has called "the imperative of judicial integrity"[5] should impel each member of this Court to grant the Petition for Rehearing and the Application for Permission to Appeal.

Respectfully submitted,

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[5] *MAPP V. OHIO*, 367 U.S. 643, 659, 81 S. CT. 1684, 1694, 6 L. ED. 2D 1081, 1092 (1961), QUOTING *ELKINS V. UNITED STATES, 364 U.S. 206.*

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Certificate of Service

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IN THE

Supreme Court of Tennessee,

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NANCY E. COTTER, ET AL.

v.

TED AUSTIN BURKHALTER, ET AL.

Chancery Court for Davidson County
No. 97-1181-I

No. M2000-03183-SC-R11-CV

Order

Upon consideration of the application for permission to appeal of Nancy E. Cotter, and the record before us, the application is denied.

PER CURIAM

FILED
Dec -2 2002

Clerk of the Courts

IN THE

Supreme Court of Tennessee,

AT NASHVILLE

NANCY E. COTTER, Individually, And As TRUSTEE Of THE VERLA DOYLE FAMILY TRUST,	)
	) **Case No. M2000-03183-SC-R11-CV**
Plaintiff-Appellant,	)
v.	)
	) **Court of Appeals**
TED AUSTIN BURKHALTER, PRUDENTIAL SECURITIES, INC.; BURKHALTER RYAN CO., P.C.; LINDA L. RESHA and NABTS, A PARTNERSHIP OF LINDA L. RESHA AND TED A. BURKHALTER,	) **Case No. M2000-03183-COA-R3-CV**
	) **Davidson Co. Chancery 97-1181-I**
Defendants-Appellees .	)

FILED
Aug 26 2002

Clerk of the Court

PLAINTIFF–APPELLANT'S APPLICATION FOR PERMISSION TO APPEAL

Plaintiff-Appellant, Nancy E. Cotter, individually and in her representative capacity,[1] respectfully petitions the Court, under Rule 11, T.R. App. P., for permission to appeal the judgment of the Court of Appeals dismissing her action, rendered by decision of April 30, 2002, and the said Court's order entered June 25, 2002, overruling her timely petition for rehearing.

I—Introductory: Case Description and Rule 11 Considerations

The grounds—as distinguished from the *reasons*—for the petition, whose rationale is explained below, are the need to secure settlement of questions of law that are both important and in the public interest and the need for the exercise of this Court's supervisory authority.

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[1] Mrs. Cotter commenced this action as remaining Trustee of Verla D. Doyle Family Trust after Co-Trustee Burkhalter's resignation. Pursuant to a Chancery-Court approved settlement order of other litigation, her consequent reappointment as Executrix and pursuant to a Davidson County Probate Court authorizing order, approving assignment of all trust assets to the Estate of Verla D. Doyle, Mrs. Cotter, by order of the Chancery Court in this later litigation, was substituted as Plaintiff, in her executrix capacity, for herself in her Trustee capacity.

The *reasons* for this application are intermeshed with the grounds, and are almost equally important: The case is an important one which has never been decided upon its merits by any court, even though there was a full evidentiary bench-trial with few traces of credibility determinations, because of defenses which, if valid, admittedly would legitimately block consideration of the merits, referred to herein as "blocking defenses." There are several reasons why the proper resolution of *the case itself* is important:

1. It grows mainly from actions by the Defendant Burkhalter, an original co-trustee of the trust, who drafted the trust instrument,[2] and represented both the trust and the settlor-decedent's estate in his dual capacities as attorney and certified public accountant, and the loss asserted consisted of moneys he admitted under oath that he received from the trust, with the complaint alleging he diverted $217,000 in trust assets, plus malpractice losses.

2. The evidence included certified copies of public records from this Court's files, in law license suspension proceedings commenced by the Board of

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[2] As shown below, the trust's losses also included federal tax losses allegedly caused by negligence of Burkhalter's accounting firm in handling the Verla Doyle Estate's estate and inheritance tax matters, and that the diversion loss could never have occurred but for a breach by Prudential Securities, Inc., of duties it owed under the Uniform Commercial Code and because of its fiduciary obligation to safeguard trust assets it possessed..

Professional Responsibility, including a false affidavit drawn by Mr. Burkhalter and executed by his co-defendant Resha, who admitted, in her sworn testimony, that the affidavit contained falsehoods (falsely stating that Burkhalter had not personally received any of the diverted money from the partnership account into which it was deposited, and that he had withdrawn from that partnership before it received any of the Doyle Trust funds), that were highly relevant when **all** of the diverted money went into the partnership of Burkhalter and Resha, except for the portion retained in Burkhalter's attorney "escrow" account.

3. Although it has always been the genuine belief of Applicant's attorney that each of the "blocking defenses" [3] is

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[3] To anticipate, the "blocking defenses" are *(I)* as to the malpractice claims, disposed of by summary judgment based upon technical tax law, the defense of statute of limitations, although the communication of possible liability **was not communicated** to a lawyer representing Plaintiff, and the descriptive account given in affidavit of the lawyer to whom the communication was actually made (then with Trabue & Sturdivant, representing a principal other than Plaintiff) was not even within the rationale of *Kohl v. Dearborn & Ewing,* 977 S.W.2d 528 (Tenn. 1998) ; *(ii)* as to the Prudential Securities UCC cause of action summary judgment dismissal, based upon a provision of a Prudential-drawn instrument (containing a self-nullifying clause),as to which neither the proponent of the defense nor any judge utilized the law as to construction of instruments as a guide to decision, and without anyone's responsive attempt to reply to Plaintiff's use of that controlling body of law; and *(iii)* the

simplistic and legally invalid, and Plaintiff-Appellant presented argumentation, almost algebraic in nature, systematically marshaling both law and facts claimed to refute each of those defenses in application to this case, such detailed critiques have been met with no attempt by anyone—neither by any judge nor by any lawyer—to point out any defects in this argumentation. In appearance, it is as if the victim's theories in this case have never even been read or given any thought by anyone.

A proper *motivation* to grant the appeal—adequate, appropriate, in the public interest, and in the exercise of this Court's supervisory powers—is that when any attorney, certified to the public as morally responsible by a license granted by this Court, is charged in a detailed pleading to have diverted *(e.g.,* to have stolen) trust funds, such a serious charge should *always* be determined upon its merits, unless pleaded "blocking defenses" shall be sustained both by the law, as correctly expounded, and by the facts, determined in accordance with time-sanctioned legal rules.

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blocking defense as to the trust-funds diversion case against Burkhalter, et al., was judicial estoppel by prior oath, as to which no attempt was made, by either any attorney or judge, to answer Plaintiff's demonstration that she had not sworn to allegedly false statement, and even if she had so sworn, refusal to engage in statutory construction rationale in support of the proposition that Rule 803(1.2), T.R. Evidence, both by its language and its framers' official comment, abolished the doctrine of judicial estoppel in Tennessee.

The *reasons* for granting the appeal are equally valid, growing from Rule 11s' purpose of the avoidance of "double appeals" (Advisory Commission's Rule 11 notes, first paragraph). Assuming that the intermediate appellate court correctly discerns the law and then follows it, a "double appeal" should never be necessary except in those few cases when important novel legal doctrines should be expounded, or when previously-recognized law is rendered outmoded by the change of times, *e.g.,* the change of universal facts.

This same purpose underlies Rule 39(a), T.R.App.P., which needs expounding by this Court. That rule's extravagant language, with a degree of particularity going far beyond the rule upon which it was based, Rule 40(a)(2), F.R.App.P.,[4] invites and authorizes all lawyers to use language theretofore never used, asserting to an appellate court that its opinion misstates the facts and/or that it misapprehends or fails to follow controlling law. Plaintiff-Applicant insists that such strong language was adopted in furtherance of constitutional mandates that the decision of litigation taking (or refusing to protect) property or rights may be done only as permitted by the "law of the Land", Constitution of Tennessee, Art. I, § 10, and Art. XI, § 16, or in the more modern phrase, by Due Process of Law, Constitution of the United States, Fourteenth Amendment.

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[4] This rule merely requires the petition to identify "each point of law and fact ... petitioner believes ... the court has overlooked or misapprehended."

Plaintiff insists that Rule 39(a) implies,[5] as the cited constitutional provisions require, that when such errors exist, when they lead to incorrect decisions, and are *accurately* called to the attention of an appellate court, that Rule imposes upon the court a duty to reconsider the opinion asserted to have identified defects. If such an accurate petition to rehear should receive this deserved response, then there seldom should be any need for a "double appeal." When, as in this case, such a petition to rehear does not receive intermediate appellate responsive *action* that Rule 39(a) impliedly requires, then decision in accordance with the law and the facts is impossible, except by this Court's review. But many Rule 11 petitions for appeal should be unnecessary if this Court should demonstrate that Rule 39(a) imposes a judicial obligation to correct erroneous opinions. These comments are made with utmost respect for the appellate judges who decided this case, and with friendship for the Opinion's writer.

The second important subject arises for the lawyer's intuition that the decision of the Court of Appeals to sustain all the "blocking defenses" out of respect for this Court's non-controlling authorities of *Kohl v. Dearborn & Ewing,* 977 S.W.2d 528 (Tenn.,1998) and *Marcus v. Marcus,* 993 S.W.2d 23,30 (Tenn., 1999).

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[5] The factual summary, *infra,* pp.8-23, points out the multiple important facts that were misstated in the Opinion of the Court of Appeals by Petition for Rehearing, which mis-statements the Court's responsive order neither corrected nor sought to justify as being accurate.

This important subject on which this Court's supervisory and instructive guidance is needful is as to the thoughtful consideration and deference that all lower courts should show to this Court's own opinions: *(i)* That they must be recognized as binding by all under the law of *stare decisis,* but not in disregard of that law, which requires differentiation between holdings and *dicta,* as well as recognition that every Opinion's *holding* is its *rationale,* rather than its *result. (ii)* That every opinion of this Court must be followed in every case to which its rationale applies,[6] but that *no opinion*

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[6] A striking recent example of this occurred when this Court's decision of *Matlock v. Simpson,* 902 S.W.2d 384 (Tenn., 1995), which inspired an immediate feeding frenzy in the plaintiffs' bar, who considered this to be a new legal foundation, nullifying every bequest to a legatee to whom the testator had previously granted a power of attorney, unless the legatee could prove the negative—the non-exercise of undue influence. This persisted, and perhaps affected judicial opinions until this sweeping attack-weapon was disarmed by *Childress v. Currie,* 74 S.W.3d 324 (Tenn., 2002). In fact, the extremely elderly and frail in almost every family gives a power of attorney to the most trusted child or relative, and any rule placing any burden on the child to avoid being disinherited would be monstrous and contrary to our culture and morality. Under *stare decisis,* even the mention of a power of attorney alone in *Matlock* was dictum, because the trusted agent there was a licensed attorney, which status always gives the attorney power over the client because of superior knowledge and reliance in the relationship; and *Matlock* strongly and expressly approved *Mitchell v. Smith,* 779 S.W.2d 384 (Tenn. App., M.S., 1989, App.den. 1989), which explained that the close relationship did not give rise

justifies importing its facts into a similar case having different facts not controlled by the opinion's rationale. And *(iii)* that the bodies of law governing the construction of statutes and legal instruments should actually be followed in construing statutes and instruments, but that *no opinion* of this or any other Court can be taken as rejecting the plain meaning of any statute or rule having controlling authority, unless the opinion has noticed or expounded such legislated statute or rule, and no opinion can be charged with having construed a statute the opinion does not mention.

II—The Judgment Below

Judgment was entered by the Court of Appeals on April 30, 2002, and Plaintiff's timely Petition for Rehearing was denied and judgment entered thereon on June 25, 2002.

III—Questions Presented for Review

Question No 1: When a petition for rehearing is filed in an intermediate appellate court, exercising the right accorded by Rule 39(a), T.R.App.P., by **accurately** identifying factual misstatements as the basis of the opinion and/or **accurately** pointing out the Opinion's failure to follow controlling law, does the rule impose an implied duty upon the Court to reconsider its original opinion and answer

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to any presumption of undue influence **unless** donor was under the power or control of the donee.

apparently valid criticisms **not addressed** in its original opinion?[7]

Question No. 2(a): With the plain language of the legislated Rule 803(1.2), Tenn. R. Ev., contradicting the continued existence of the common-law doctrine of judicial estoppel by prior inconsistent sworn testimony, and with the comments of the Advisory Commission on such rules made it clear that abolition of the doctrine of judicial estoppel was the purpose of the Rule's language, is the common-law rule of judicial estoppel still law in Tennessee, and can this Court's opinion in *Marcus v. Marcus,* 993 S.W.2d 596 (Tenn. 1999), assuming the continuing existence of judicial estoppel as law, be considered as nullifying the plain legislative purpose and effects of enacting Rule 803(1.2), under the law of *stare decisis?*

Question No. 2(b): Following an evidentiary bench trial on the merits, was Plaintiff judicially estopped, under the common-law doctrine of judicial estoppel, because she signed and swore to a Probate Court accounting when *(i)* the accounting had inserted in it a textual paragraph (arguably misleading as contrary to Plaintiff's insistence that money was diverted by her co-trustee from the trust corpus) which did not refer to probate assets but only to trust assets, as to which the law did not require a Probate Court accounting; *(ii)* Plaintiff did not swear to the truth of the textual paragraph or

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[7] This first question is last in the briefing, because its answer will not affect Plaintiff's substantive rights, and it concerns this Court's supervisory discretion.

any part thereof, as proven by the plain language of the Court-furnished affidavit of the truth of receipts and disbursements listed; *(iii)* the Chancery Court expressly found that the paragraph and its misleading sentence were inserted on the sheet listing disbursements by Defendant Burkhalter (charged with having misappropriated the funds), which could only have been for his own self-serving ends; and *(iv)* Plaintiff did not read the narrative paragraph or its misleading sentence before signing the oath, which appeared on a separate unattached page.

Question No. 3: Whether Defendant Prudential Securities' motion for summary judgment of dismissal was properly granted (upon proof that it was a fiduciary having total control of all assets in an investment account it held in the name of the Verla D. Doyle Family Trust) upon defensive arguments that monetary withdrawals secretly initiated by Burkhalter, as Co-Trustee of a trust account held by Prudential, were within Burkhalter's authority, based mainly upon a Prudential-drawn protective document which said it could rely upon instruction from any single trustee ("Unless is it specified otherwise, . . ."), when the Trust Instrument, a copy of which was in Prudential's possession, provided that ". . . if only two individual trustees are in office [which was the case here], they must act unanimously."—where liability against Prudential was not asserted on the basis of an individual trustee's lack of authority but two entirely different bases set out below, as to each of which an individual trustee's separate authority is irrelevant unless he be deemed authorized to convert trust funds to his own use. The bases of alleged liability are: (a) As to most of the diversions, with each of the *Prudential's* checks being payable to "The Verla

D. Doyle Family Trust" Prudential, as bank account owner, accepted them and charged the amounts back against the investment account, although not one of the checks was endorsed by "The Verla D. Doyle Family Trust" and most were not endorsed at all: and (b) Where the two co-trustees, Burkhalter and Plaintiff Cotter, had entrusted pre-signed blank authorization forms to a Prudential broker, in whose absence Prudential, through a clerical employee, filled out one of the pre-signed forms taken from the Broker's office directing the issuance of two checks, one to Burkhalter and to a firm whose bank account was controlled by his partner Resha, was this an unauthorized act by Prudential under the applicable law on the construction of legal instruments, when both the heading and provisions of the pre-signed instrument restricted its use to authorizing inter-account transfers, not to the issuance of checks?

Question No. 4: Was summary judgment dismissal of Plaintiff's malpractice claim against Defendant Burkhalter's accounting firm, Burkhalter Ryan Co. P.C., on statute of limitations grounds correct under *Kohn v. Dearborn & Ewing,* 977 S.W.2d 528 (Tenn. 1998), when this action was proven to have been brought in less than a year after first communication of possible tax-liability liability to Plaintiff's attorney, and when an earlier IRS communication (a) was to an attorney who neither represented nor communicated to plaintiff, and (b) by affidavit of the lawyer (representing a different principal, not plaintiff) who actually received the IRS communication, the communication was merely a routine one.

IV—Facts Relevant to Questions Presented

To introduce the facts by a very general summary, Verla D. Doyle was the surviving widow of deceased Nashville attorney Jacobs H. Doyle, and her only heirs at law were her deceased sister's daughters, her three nieces, of whom Plaintiff Cotter was the only one living in Nashville. Mrs. Doyle hired Mr. Burkhalter in July, 1992, to draw a power of attorney designating Plaintiff as her agent, which power of attorney was never used except to carry out Mrs. Doyle's instructions transmitted to Plainiff through Mr. Burkhalter, and contrary to Plaintiff's individual interests. Then after Mrs. Doyle had conferred with him about estate-planning in the fall of that year, Burkhalter prepared trust instruments in January, 1993, naming himself and Plaintiff as co-Trustees. Mrs. Doyle died soon after they embarked on trust administration, with Plaintiff designated as the executrix of her estate. Both the trust and estate checking accounts were set up at NationsBank with Mrs. Cotter's address being the address of record to which statements were sent, and she retained both checkbooks. The Trust's investment account, with over three million dollars of securities and cash, was set up with defendant Prudential Securities, with Defendant Burkhalter's office address as the address of record, to which all statements were mailed and over time, Burkhalter requested a series of checks, which Prudential issued payable to the account-owner (The Verla D. Doyle Family Trust) and mailed to the account's address of record, Burkhalter's office, and Burkhalter deposited all of them in his attorney's escrow case, then disbursing large portions of those moneys to his and co-Defendant Resha's tax return service partnership, NABTS.

Later, some Catholic charities, led by St. Xavier University, represented by a different lawyers under the leadership of Charles A. Trost, Esq., commenced legal attack upon the trust, eventuating in a chancery court action against the co-trustees Cotter and Burkhalter, referred to herein, and in the Courts below, as *The Catholic Charities Case.* In 1996, after Mr. Trost had deposed Mr. Burkhalter, he proposed a settlement, and statements in these conversations caused Mrs. Cotter's attorney Kilgore to call Burkhalter on April 3, 1996, and ask to examine copies of attorney-fee checks to him signed by Mrs. Cotter. In reply, Mr. Burkhalter faxed a list identified as attorney-fee checks, including a number issued by Prudential Securities, of which Mrs. Cotter denied any knowledge. When Mrs. Cotter requested and later received copies of the checks from Prudential, they turned out to be much larger (one, listed at $10,000.00, turned out to be for $50,000.00) than the check amounts listed on Burkhalter's fax, which led to Mrs. Cotter's charge that he had diverted trust funds. She did arrive at a settlement with the Catholic Charities, which explicitly preserved her right to sue to enforce the Trust's claim against Burkhalter for diversion of its assets, which led to this action.

In the present action, both the claims against Prudential for breach of its fiduciary obligations and against Burkhalter-Ryan for accounting malpractice were disposed of on cross-motions for summary judgment, with the Chancellor overruling Plaintiff's motions and sustaining the defensive motions, and after evidentiary bench trial, the Chancellor dismissed Plaintiff's actions, without considering its merits, upon the doctrine of judicial estoppel. In appealing to the Court of Appeals, Plaintiff insisted that the Chancellor erred

in sustaining all three of the "blocking defenses," which merited reversal, but also sought summary judgments against both Prudential and Burkhalter-Ryan as well as judgment on the merits against Burkhalter and Resha in the exercise of the Court of Appeals' trial de novo jurisdiction, and sought remand to determine punitive damages primarily against Prudential, but also against Burkhalter.

The facts are set out in greater detail in the Opinion of the Court of Appeals, and in even greater detail in Applicant's brief on the merits. However, as asserted above, Applicant claims the Opinion's factual summary was inaccurate. Applicant believes it adequate, under Rule 11(b)(3), T.R.App.P., to point out only the statements deemed inaccurate in the Opinion, and these are set out below, taken verbatim from her Petition for Rehearing in the Court of Appeals.

The factual misstatement of prime importance is described—with justification for asserting its inaccuracy—in the text of the Petition for Rehearing, as follows:

> ". . . [The Opinion's] prime factual fault is its incorrect conclusion that Petitioner, Nancy E. Cotter, signed a false affidavit, which is untrue, and there is *no evidence* in the record, as shown below, to support this incorrect assumption. But the fictitious assumption permeates the Opinion. The *only* evidence in the record on whether Cotter signed a false affidavit is extremely brief, but was not quoted

or even mentioned in the Opinion. Appellees throughout asserted the *conclusion* that she falsely swore, but neither they nor this Court made the slightest effort to refute Plaintiff's logical demonstration that she never swore to a false fact. The record establishes that an accounting document had been filed in the Probate Court consisting of a sheet listing assets she had received into her executrix's account, a separate sheet listing credits for disbursements, and a third sheet—the standard Probate Court-furnished estate report affidavit—proving conclusively exactly what Plaintiff swore to: "I, Nancy E. Cotter, do solemnly swear that the foregoing settlement of my account as executrix . . . exhibits a full, true and just statement of . . . the assets *of the estate* . . . and of credits to which I am entitled . . . (Tr., VI:220). The language of the oath speaks of nothing but amounts received and amounts disbursed from estate funds, and there is **no evidence** in the record that the oath sheet was even stapled to the asset sheet and the disbursement sheet when the oath was signed. Mr. Burkhalter inserted a textual paragraph at the end of the sheet listing estate disbursements, but there is no evidence in the record that Cotter even read the textual paragraph before signing the oath page of the document. The **only way** it can be concluded that Cotter swore to the textual paragraph is by inserting into the Court-printed language of the oath words that are not there and that she never signed. Her testimony, unrefuted by appellees and not discredited by the Court below, was that she had no recollection of having read the textual paragraph—typed (at some

time) on the disbursements sheet—before she signed the oath sheet. (Tr., V:133-134). It is understandable that counsel in litigation can assume from mere appearances, without analyzing an instrument's language, that a notarized signature on the final page of a multi-paged document is an oath to the truth of all statements made on each of the preceding pages, but counsel's hasty first impressions must yield to the corrective practice of actually reading, and even thinking about, the written words of the proof. Judicial factual summaries must be based upon evidence, not upon counsel's uncorrected self-serving first impressions."

(Petition to Rehear, pp. 2-3; emphasis in the original)

Simple examination of the trust accounting, shows it was signed by both Burkhalter and Mrs. Cotter, but was unsworn, was never filed in the Probate Court, and Mrs. Cotter not only testified that she denied its accuracy when Mr. Burkhalter presented it to her, but checked the entries she disputed, and the Petition for Rehearing accurately summarizes the undisputed evidentiary record on this, and is quoted below, with its footnotes re-numbered:

"These factual assumptions this Court accepted from the defensive briefs—that Mrs. Cotter swore to Mr. Burkhalter's textual statement about a different accounting, the informal trust accounting of assets not a part of the probate estate—are simply untrue and

fictitious. As her oath says, she swore *only* to the receipts and disbursements **in the estate account,** not in the trust account, which informal accounting she and Mr. Burkhalter signed **but did not swear to.** The Probate Accounting did not list the trust receipts and disbursements, and even in signing the unsworn trust accounting, Mrs. Cotter insisted to Burkhalter that it was wrong, and her recollection recorded for other purposes was of the Probate Accounting as two sheets of *figures.*[8] Mr. Burkhalter, as her lawyer, instructed her to sign it and it could be corrected later.[PROPER FN. NUMBER] This Court's acceptance of fictitious "facts" as truth is contrary to the findings of fact made orally by the Chancellor, without any subsequent factual revision and without any post-findings evidentiary basis for change—

". . . Now Mrs. Cotter has testified in the matter, and given that testimony in effect that she signed the

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[8] "Burkhalter immediately handed me *two more pages of figures*. He said they were the figures for the accounting of the estate and that the estate papers were official and that the Trust documents were just complimentary unofficial documents. *He told me to go on and sign both sets of documents and if I wanted him to, he would go over the figures for the Trust later and make any necessary changes.* There was an urgency to sign these documents . . ." (T.Rec., III:405-409, at ¶ 7; emphasis added).

informal document, called informal, **but it was signed under oath. . .** [9]

". . . The Court's of the opinion and finds in this case that Mrs. Cotter completely relied on Mr. Burkhalter, who had the superior knowledge as attorney and CPA, had prepared the document, and he inserted the clause or the paragraph in that document stating that, in fact, that all of the disbursements listed above Mrs. Cotter's signature were true.

"(Tr. VI:302–303; emphasis added)."

Petition to Rehear, pp. 3-4 (footnotes re-numbered, all emphases in original).

Other factual misstatements in the Opinion include some of little apparent consequence, but which fitted in with the Opinion's inaccurate factual view of the case, and were set out in a footnote in the Petition for Rehearing:

> "These incorrect statements include *(i)* "Burkhalter additionally drafted [Verla] Doyle's Last Will and Testament . . ." (Opinion, p. 4), when the July 20, 1989 will was actually drawn by Robert F. Doyle, the foster son of Verla Doyle's deceased brother-in-law, three years before Burkhalter first talked to Mrs. Doyle on July 31, 1992 (Tr., V:145-146). *(ii)* the

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[9] The Court's statement that the *trust accounting* was signed under oath is unsupported by any evidence. It was the Probate Accounting, not the informal trust accounting, that was sworn.

statement that the *Catholic Charities Case* settlement provided for the Trust's assets to be transferred to the Doyle Estate's "new administrator, First American Trust Company." (Opinion, p. 5), when the new administrator was retired Judge Joe C. Loser, who signed the settlement agreement as the exhibit shows (Trial Ex. 40, referenced R., VI:249). *(iii)* Reference to the education trust being for the benefit of Cotter's children (Opinion, p. 4), actually for Verla Doyle's sister's 3 grandchildren, of whom two were Cotter's children (R, VI:208)."

(Petition for Rehearing, p. 2, n. 3)

The Opinion's mis-statements of greater direct consequence are set out in another footnote to the Petition for a rehearing, re-formatted into separate sub-paragraphs for more convenient reading, as follows:

"To point out most of these misstatements,

"*(i)* the Opinion, before quoting the textual matter inserted by Burkhalter following the list of disbursements, says in part: "Cotter's final accounting . . . states, in pertinent part:" (Opinion, p. 6), even though the Burkhalter-inserted paragraph was not a part of the **probate** accounting, did not refer to probate estate receipts and disbursements, but only to trust data, as to which it has already been shown that no Probate Court Accounting was required (Appellant's Reply Brief, pp. 1-2, citing, *inter alia,* T.C.A. § 30-2-601).

"*(ii)* The statement that the inserted paragraph "immediately precedes Cotter's sworn verification of her accounting" (Opinion, p. 7), is misleading in its implication that her signature immediately followed the paragraph, when the data-verifying oath was on a separate page not shown to have been attached to the accounting sheets when signed *(supra,* p. 11, n. 8).

"*(iii)* The Opinion's statement that the "two-page summary . . . *to which Cotter referred* when verifying that 'all disbursements and transactions in trust . . .'," (Opinion, p. 7) is factually untrue because there is **no evidence** that her oath swore to anything but estate receipts and disbursements, there is no evidence that she read Burkhalter's inserted paragraph before making oath to **the probate estate data,** all as shown above.

"*(iv)* The Opinion's statement that Cotter didn't dispute (Opinion, p. 7, n. 8) "either the $50,000 loan or the $170,000 NABTS investment shown on the Trust accounting" is true as to the loan, which she authorized (as stated in her pleadings and all her testimony) but she **at all times** denied **any** knowledge that Burkhalter had diverted the $120,000 **or any money** to NABTS, which Burkhalter later described as investments. The $50,000 actual loan, made to Absolute Video, not NABTS, was included in the total amount of $170,000 the "accounting" assigned to NABTS, and Cotter denied to Burkhalter,

when he first presented this list, any knowledge of payments to NABTS (R., V:155-156; VI:263-264) until she got her first factual indication of it from Burkhalter's fax of April 3, 1996."

(Petition for Rehearing, pp. 4-5, n. 6.)

IV—REASONS SUPPORTING REVIEW BY THIS COURT

The reasons for the need for review are strongly indicated in the introductory statement, which sought to introduce to the Court the seriousness and scope of this case without unnecessary citations of authorities in that statement. But the need for review by this Court is quite obvious in two aspects, in the need for authoritative decisions upon important issues of law never expounded by this Court. One such issue is the need for a substantive construction of Rule 39(a), T.R.App.P., which clearly implies an obligation upon every appellate court to correct factual and legal errors clearly identified by a timely and adequate Petition for Rehearing, because the entire underpinning of our society is that we live under the rule of law. The second unexplored issue is whether Rule 803.1.2, T.R.Evidence, abolishes the common-law doctrine of judicial estoppel by prior testimony, when the plain language of that Rule must have that effect, when such was the declared intent of the Advisory Commission, and such was recognized as the language's plain meaning by Tennessee's current leading authority on evidence, Tennessee Law of Evidence, § 8.05(10), pp. 8-58, 59 (Cohen, Sheppeard and Paine, 4th Ed., 2000), quoted, Opinion, p. 9.

In the face of assertions that the Opinion mis-stated facts and misapprehended or failed to follow controlling law, the denial of rehearing in this case is most unusual, in that it did not affirmatively assert the correctness of its factual statements nor explicitly assert that it had followed the law, but was written as if to leave to this Court the determination of these serious issues.

Most Court of Appeals denials of petitions for rehearing are made without opinion,[10] leading to the conclusion that the appellate attorney likely failed to appreciate that the opinion had correctly resolved all issues requiring resolution. Mentioning such decisions as examples rather than authorities, of the 32 Lexis-reported written opinions issued on denials of rehearings in the past two years, most communicated no thoughts at all on why the Opinion was deemed correct, one explained that the petition was untimely,[11] one rejected the petition as moot because the opinion had already been withdrawn,[12] and one carefully demonstrated that the petition was incorrect in charging factual misstatements,[13] and only the remaining 11 orders

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[10] In Lexis examination of such denials over the past 2 years, 5 petitions to rehear were granted and 85 denied, 53 denials being without any opinion.

[11] *Karls v. Pitzer,* 2000 Tenn.App.LEXIS 724 (W.S.,).

[12] Hopper v. Hopper, 2001 Tenn. App. LEXIS 377 (M.S.,)

[13] In re: Estate of Barnhill, 2001 Tenn. App. LEXIS 25 (W.S.,).

enunciated reasons why the petition for rehearing were incorrect.[14]

Intuition would suggest that the Opinion's decisions sustaining the "blocking defenses" was impelled by respect for this Court, in the assumption that the Court should not even adjudicate the issue of Rule 803's abolition of the doctrine of judicial estoppel, simply because this Court applied that common-law rule after modification of Rule 803 into its present form, although this Court did not consider the effects of Rule 803.1.2 in deciding *Marcus v. Marcus,* 993 S.W.2d 23,30 (Tenn., 1999). But the law of *stare decisis* which must be, and is, applied by courts at every level of every judicial system in America, declares that no case is authority for any proposition not decided by it. This was enunciated quite plainly in *Webster v. Fall*, 266 U.S. 507, 511, 69 L.Ed. 411, 412, 45 S.Ct. 148 (1924): "The most that can be said is that the point was in the case if anyone had seen fit to raise it. Questions which merely lurk in the record, neither brought to the attention of the court or ruled upon, *are not to be considered as having been so decided as to constitute precedents*." (emphasis added). In application of

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[14] These informative denials of rehearing petitions were *Wilson v. Wilson,*2001 Tenn. App. LEXIS 281 (E.S.), *Travelers Indem. Co. v. Freeman, 2002 Tenn. App. LEXIS 286* (M.S.), *Summers v. Town of Walnut Grove,* 2001 Tenn. App. LEXIS 415 (M.S.), *Steen v. Steen,* 2001 Tenn. App. LEXIS 450 (M.S.), *Croley v. Tiede,* 2000 Tenn. App .LEXIS 728 (M.S.), *Coffelt v. Tennessee Dep't. of Correction,* 2001 Tenn. App. LEXIS 174 (M.S.), and *Boyd v. Bruce,* 2002 Tenn. App. LEXIS 51 (M.S.).

this principal, when this Court, over time, mistakenly issues two diametrically opposed decisions as to the same rule of law, one of which *must be wrong,* lower courts have no alternative but to determine which correctly represents Tennessee law, *State ex rel. Harbin v. Dunn,* 39 Tenn. App. 190; 282 S.W.2d 203 (M.S., 1943), which this Court much later approved and ordered published in *Day v. Walton,* 199 Tenn. 10, 281 S.W.2d 685 (1955).

Even aside from the intended abolition of the common law rule of judicial estoppel, the Opinion took no note of holdings that judicial estoppel does not apply unless the person has wilfully sworn falsely, so that her swearing to estate account receipts and disbursements—figures, not a narrative paragraph—cannot be an oath to a narrative paragraph about a trust totally outside the estate, which paragraph she didn't even read, *D. M. Rose & Co. v. Snyder,* 185 Tenn. 499 (1947), *Monroe County Motor Co. v. Tennessee Odin Ins. Co.,* 33 Tenn. App. 223, 231 S.W.2d 386 (E.S., 1950 Cert.den. 1950), *Phoenix Ins. Co. v. Jordan,* 28 Tenn. App. 11, 184 S.W.2d 721 (M.S., 1944, Cert.den., 1944).

The opinion accepted *Kohl v. Dearborn & Ewing,* 977 S.W.2d 528 (Tenn., 1998) as authority to support the defense that Mrs. Cotter's malpractice claim was barred by the statute of limitations, quite contrary to that case's own proviso,[15]

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[15] "We *do not mean to suggest* by our holding that the mere routine questioning by the IRS of a tax return is always sufficient by itself to trigger the running of the

with the attorney to whom IRS made its routine communication, James C. Stanley, of Trabue & Sturdivant, representing retired Judge Joe C. Loser, Administrator, C.T.A., D.B.N., of the Estate of Verla D. Doyle, never having represented Mrs. Cotter, so his knowledge could not be imputed to her under any agency principles, as held by *Caledonia Leasing and Equipment Co., Inc. v. Armstrong, Allen, Braden, Goodman, Mcbride & Prewitt,* 865 S.W.2d 10 (Tenn.App., W.S., 1992, App.den. 1993).

As to **every** "blocking defense" the Opinion failed to follow controlling authority, with Prudential's defense determinable by no body of law other than that as to the construction of instruments. As to this defense, the Opinion assumed that Prudential was not a fiduciary, although it held millions of dollars of the trust's assets under its own exclusive control, therefore a trustee, *Pridemore v. Cherry,* 903 S.W.2d 705 (Tenn.App., M.S., 1995).

Finally, with both Courts below having failed to apply controlling law, this case will have achieved the destruction of Mrs. Cotter's valuable rights contrary to the Law of the Land, as protected by the Constitution of Tennessee, and to Due Process of Law, in violation of the Fourteenth Amendment to the Constitution of the United States, unless this Court shall grant the appeal, and assure that the case shall

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statute of limitations as a matter of law for a potential legal malpractice action. We recognize that inquiries by governmental agencies into business transactions are routinely conducted." (977 S.W.2d, at 533-534).

be decided upon the law and the facts, both determined as the law directs.

Respectfully submitted,

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Certificate of Service

It is hereby certify that copies of the foregoing have been mailed by First Class Mail, postage prepaid, this August __ 2001, to the following addressees:

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CARROL D. KILGORE

IN THE

Tennessee Court of Appeals,

AT NASHVILLE

NANCY E. COTTER

v.

TED AUSTIN BURKHALTER, ET AL.

Appeal form the Chancery Court for
Davidson County No. 97-1181I
Hon. Irvine H. Kilcrease, Jr. Chancellor

No. M2000-03183-SC-R11-CV

Order

Plaintiff/appellant, Nancy E. Cotter, has petitioned this court for a rehearing on a number of issues, each of which were raised on appeal and previously ruled upon by this court adverse to the plaintiff/appellant. Having fully considered the petition and the points raised therein, we are of the opinion that our original resolution of the issues should remain unchanged. Wherefore, the petition for rehearing is respectfully denied.

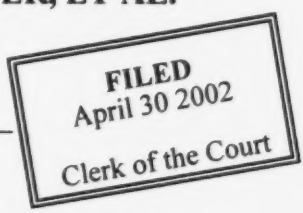
/s/ Frank G. Clement, Jr.
Frank G. Clement, Jr. Special Judge
/s/ William B. Cain
William B. Cain, Judge
/s/ Patricia J. Cottrell
Patricia J. Cottrell, Judge

COURT OF APPEALS OF TENNESSEE, MIDDLE SECTION, AT NASHVILLE

NANCY E. COTTER

v.

TED A. BURKHALTER, ET AL.



No. M2000-03183-COA-R3-CV

2002 Tenn. App. LEXIS 310

Opinion

Filed April 30, 2002

PRIOR HISTORY:

[*1] Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed and Remanded. Appeal from the Chancery Court for Davidson County. No. 97-1181-I. Hon. Irvin H. Kilcrease, Jr., Chancellor.

DISPOSITION:

Judgment of the Chancery Court Affirmed and Remanded.

COUNSEL:

Carrol D. Kilgore, Nashville, Tennessee, *for the appellant,* Nancy E. Cotter.

D. Alexander Fardon, Nashville, Tennessee, *for appellees,* Ted A. Burkhalter, and Burkhalter, Ryan & Co., P.C.

John S. Hicks, Nashville, Tennessee, *for appellee,* Prudential Securities, Inc.

Linda L. Resha, Nashville, Tennessee, *Pro Se.*

JUDGES:

FRANK G. CLEMENT, JR., SP. J., delivered the opinion of the court, in which **WILLIAM B. CAIN** and **PATRICIA J. COTTRELL,** JJ., joined.

OPINION BY:

FRANK G. CLEMENT, JR.

OPINION:

This appeal arises from an action by a Trustee against: (1) Ted A. Burkhalter (Burkhalter), an

accountant/attorney, and the accounting firm, Burkhalter, Ryan & Co., P.C., for professional malpractice; (2) Burkhalter, a former co-trustee, for alleged breach of fiduciary duties; (3) Burkhalter and his partner, Linda Resha, in a general partnership, for alleged conspiracy to defraud and convert funds from the trust; and (4) Prudential Securities, **[*2]** Inc. for breach of fiduciary duty by allegedly permitting the diversion of funds by Burkhalter. The Chancery Court granted summary judgment in favor of Burkhalter and Burkhalter-Ryan finding that the malpractice claims were time-barred. The Chancery Court also granted summary judgment in favor of Prudential Securities finding that Prudential had not breached a fiduciary duty to the trust. Following a bench trial on the remaining issues, the Chancery Court found that the plaintiff/appellant was judicially estopped from pursuing the claims against Burkhalter for alleged breach of fiduciary duties as a trustee, and found in favor of Burkhalter and Resha on the claim of conspiracy to divert funds, finding there was insufficient evidence to establish that a conspiracy existed. We affirm.

The appellant/plaintiff, Nancy E. Cotter, Individually, and as Trustee of the Verla Doyle Family Trust, sets forth the following issues on appeal.

I. Issues pertaining to claims against Ted A. Burkhalter as a Co-Trustee.

(A) Whether the Chancery Court erred in dismissing plaintiff's claim against Ted A. Burkhalter, as Co-Trustee, upon a finding that plaintiff was judicially estopped based upon **[*3]** a sworn accounting filed in the Probate Court?

(B) Whether the Chancery Court should have entered judgment against Ted A. Burkhalter and Linda Resha for conspiring to divert funds from the trust?

II. Issues pertaining to Prudential Securities, Inc.

Whether the Chancery Court erred in sustaining Prudential Securities' motion for summary judgment thereby dismissing plaintiff's claims against Prudential Securities based upon written agreements with the Co-Trustees, and, conversely, in overruling plaintiff's motion for summary judgment against Prudential Securities?

III. Issues pertaining to Burkhalter Ryan & Co., P.C. and Ted A. Burkhalter.

Whether the Chancery Court erred in sustaining the motions for summary judgment of Ted A. Burkhalter and Burkhalter, Ryan & Co., P.C. thereby dismissing plaintiff's professional liability c laims a gainst b oth defendants upon statute of limitation defenses, and, conversely, in overruling plaintiff's motion for summary judgment against Ted A. Burkhalter, and Burkhalter, Ryan & Co., P.C.?

Background of the Case

Nancy E. Cotter, individually, n1 and as Trustee of The Verla Doyle Family Trust, and as the Executrix

of the Estate n2 **[*4]** of Verla Doyle, is the plaintiff/appellant.

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n1 It is generally conceded that Ms. Cotter individually is not entitled to any relief.

n2 The appellant's brief makes little reference to the claims by the decedent's estate as distinguished from the claims by Cotter,

Ted A. Burkhalter (Burkhalter) is a defendant/appellee. He is a defendant in his capacity as an accountant and attorney who rendered services for the decedent, her estate and the trust at issue. He is also sued for alleged acts or omissions in his role as a Co-Trustee. The action against Burkhalter, individually, is an action against an accountant/attorney who drafted a trust instrument and served as co-trustee (with the plaintiff/appellant) and who additionally served as the accountant **[*5]** and attorney for the trust and the estate. The plaintiff alleges that Burkhalter, as co-trustee, diverted $ 217,000 of the trust funds for his own use. The plaintiff also alleges malpractice against Burkhalter for negligence in drafting the trust instruments.

Burkhalter, Ryan & Co., P.C. (Burkhalter-Ryan) is a defendant/appellee. It is an accounting firm. Mr. Burkhalter was a principal of the firm. The malpractice claims against Burkhalter-Ryan generally

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individually, and by her as the Trustee, though the estate was added as a plaintiff by order entered Aug. 20, 1997. Page four (4) of the appellant's brief states the "Nature of the Case" as being "an action by a Trustee of a trust" making no mention of the estate.

arise from the alleged acts or omissions of Ted Burkhalter as an attorney and accountant, not as trustee.

Linda Resha is a defendant/appellee. She was a partner with Burkhalter in a general partnership. She is alleged to have conspired with Burkhalter to divert funds from the trust.

Prudential Securities, Incorporated (Prudential) is a defendant/appellee. Plaintiff's claim against Prudential alleges breaches by Prudential of fiduciary obligations thereby allowing moneys to be diverted by Burkhalter. Prudential's contractual relationship in the matters at issue arise from two agreements, one being a "Fiduciary Certification of Investment Powers Agreement," the other being a series of "Letters of Authorization."

This appeal, and **[*6]** the matters at issue herein, arise from and were preceded by the administration of the estate of Verla D. Doyle in the Davidson County Probate Court and by a related civil action which was prosecuted by parties, generally referred to as "the Catholic Charities," against the Co-Trustees of the Verla D. Doyle Family Trust in the Davidson County Chancery Court under the style of *First American*

Trust Co., et al., v. Nancy E. Cotter, et al., Civil Action No. 95-57-III (sometimes referred to as the "Catholic Charities Case").

Ms. Cotter was the niece of Verla Doyle. She is a beneficiary under the trust and the will. She was named Executrix of the estate and Co-Trustee of the trust. Initially, Cotter served as Executrix of the probate estate of Verla Doyle, however, she resigned following the filing of a civil action against her by the "Catholic Charities." She was succeeded by First American Trust Company. Upon settlement of the Catholic Charities case, First American resigned. Ms. Cotter resumed her former duties as Executrix following the settlement of the Catholic Charities Case and the corresponding resignation by First American.

Ms. Cotter also served as a Co-Trustee of the Verla [*7] Doyle Family Trust. She initially served with Ted Burkhalter as a Co-Trustee. Following the resignation of Ted Burkhalter, Ms. Cotter continued to serve as the sole Trustee.

Nine months before Mrs. Doyle died she, with the assistance of Cotter, retained Burkhalter to help with estate planning and related matters. Burkhalter

drafted, among other documents, the Doyle Family Trust, being an intervivos trust. Cotter and Burkhalter were named co-trustees of the Doyle Family Trust. Doyle conveyed most of her $ 3.5 million in assets to this trust. n3 Burkhalter also drafted Doyle's power of attorney, naming Cotter attorney-in-fact. Burkhalter additionally drafted Doyle's Last Will and Testament, which bequeathed $ 1.625 million of her estate to various charities, mainly the Catholic Charities referenced above. The will bequeathed to Cotter certain direct bequests, including Doyle's house, $ 80,000 and personal property, which were in addition to what Cotter would receive under the Doyle Family Trust.

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n3 The Doyle Family Trust directed the Co-Trustees (Cotter and Burkhalter) to apply the Trust's assets in this order upon Doyle's death: (1) fund, as needed, an educational trust for relatives; (2) pay Doyle's debts and funeral bills; (3) $ 600,000 to Cotter; (4) $ 150,000 each to Doyle's other two nieces; (5) $ 25,000 each to the children of Doyle's three nieces; (6) $ 20,000 to a non-relative; (7) fund a charitable remainder trust with $ 750,000; and (8) dispose of anything left at the trustees' discretion.

[*8]

A few months later, in December 1992, Doyle executed a codicil to her will. Additionally, Doyle transferred $ 40,000 to an "exemption trust" for the education of Cotter's children.

Shortly before Burkhalter prepared the instruments referenced immediately above, $ 610,770 of Doyle's funds, which had been on deposit in her individual account, were transferred into joint survivorship accounts with Cotter. The latter transactions, those in late 1992 and early 1993, left few assets for disposition under Doyle's Will. n4 Mrs. Doyle died on April 9, 1993.

The charities, and other relatives of Doyle that were legatees to most of Doyle's assets under her will, filed suit to invalidate the Family Trust, the Exemption Trust, and the transfer of $ 610,770 to Cotter via the survivorship accounts. The Catholic Charities (along with Cotter's sisters, Doyle's other nieces) claimed that Doyle had been incompetent [*9]

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n4 It is undisputed that Burkhalter was unaware of the transfer of $ 610,000 and creation of survivorship accounts.

for some time and that Cotter had unduly influenced Doyle to Cotter's advantage, resulting in Cotter receiving at least one million dollars more than she would have received.

The plaintiffs in the Catholic Charities Case also sought to remove Cotter as executrix. Cotter, in response to the removal petition, resigned as executrix. The Probate Court appointed First American Trust Company to succeed Cotter as the Estate's administrator. The Probate Court also ordered Cotter to submit a final accounting. Cotter filed her accounting with the Probate Court Clerk in September 1994.

Cotter Settles with the Charities.

Burkhalter resigned as a co-trustee of the Doyle Trust while the charities' lawsuit was pending. Thereafter, the Trust, along with Cotter individually, settled with the charities, which settlement required that Cotter and the Estate of Verla Doyle pay the charities one million dollars. n5

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n5 The amount of $ 1,625,000 had been bequeathed to the charities in the Doyle will.

To fund the settlement, [*10] Cotter agreed that she would transfer all of the Trust's assets to the Doyle Estate, in care of its new administrator, First American Trust Company. Cotter also agreed to personally restore to the Estate additional monies the Estate may need to fund its one million dollar settlement with the Catholic Charities. The final judgment in the Catholic Charities Case required that all trust moneys be transferred to the Estate. The final judgment stated:

Immediately upon the finality of this Order, there shall be transferred from the Trustee of the Verla Doyle Family Trust and vested in the Administrator, C.T.A. of the Estate of Verla Doyle, Deceased, all claims of any nature asserted by the Trust, including the assertion of the Defendant Cotter that the Trust has a valid claim against her former Co-Trustee for unauthorized diversion of trust funds. In addition, the Trustee shall transfer and pay over to the Administrator all funds remaining in any and all bank accounts of the Verla Doyle Family Trust and shall assign and transfer to the Administrator all investment accounts presently owned in the name of the Verla Doyle Family Trust. Upon such payments over and assignments to the Administrator, [*11] C.T.A., (First

American Trust Company) the Trust will no longer have any assets upon which it can operate nor any possibility of receiving additional assets in the future, the same will thereupon immediately terminate by operation of law, and the said Trust shall thereby be deemed to be void *ab initio*.

The settlement provided that Cotter could keep the rest of the money she received via the joint accounts and the Trust. n6 Furthermore, Cotter and the charities agreed that Cotter was to be re- named executrix of the Doyle Estate following satisfaction of the bequests (settlement) to the charities.

In August 1997, following settlement of the Catholic Charities Case, Cotter was reinstated as Executrix of the Verla D. Doyle Estate. **[*12]**

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n6 As a result of the settlement with the charities, no legatee under Doyle's Will, and no beneficiary under the Trust, is expected to receive any more money from the Trust or from the Estate, at least until Ms. Cotter recoups the funds she had to remit pursuant to the settlement.

Thereafter, Cotter, in her capacity as Executrix, was substituted as the plaintiff in this matter.

Summary Judgment Rulings.

Plaintiff filed a motion for summary judgment on her malpractice claim against the accounting firm, Burkhalter-Ryan. The Burkhalter defendants filed a cross-motion for summary judgment, asserting *inter alia*, that Plaintiff was judicially estopped by virtue of a sworn statement filed in the Probate Court. On the cross-motions for summary judgment as to malpractice claims against Burkhalter and the Burkhalter-Ryan accounting firm, the Court dismissed such claims as time-barred by *T.C.A. § 28-3-104(a)(2)* on authority of *Kohl v. Ewing, 977 S.W.2d 528, 532-533 (Tenn.1998)*, by order of May 21, 1999. The Court did not rule upon the defendants' contention "that Cotter is judicially estopped from denying that the trust transactions were 'made in accordance with the trust instrument' as she represented under oath in Probate Court."

Plaintiff also filed a motion for summary judgment against Prudential. Prudential filed a cross-motion for summary judgment and, thereafter, a (Renewed) Motion for Summary Judgment **[*13]** on

January 20, 2000. Initially, the trial court denied the cross-motions for summary judgment by Prudential and Cotter by order entered May 21, 1999; however, on February 4, 2000, the Court sustained Prudential's (Renewed) Motion for Summary Judgment. The stated basis for the ruling was the co-trustees' signatures to Prudential's "Fiduciary Certification of Investment Powers" form and "the language of Article XIV, Section C of the Verla D. Doyle Trust document ...."

Bench Trial in July 2000.

A three-day bench trial was held in July of 2000. The Court took the case under advisement at the end of the trial. n7 On October 3, 2000, the Chancellor rendered a memorandum opinion granting judgment for the defendants on all remaining issues. The Chancellor's memorandum opinion included findings that Burkhalter made withdrawals from the trust fund account, and that as to at least four of these, portions of the "proceeds of these withdrawals were deposited into the Resha//Burkhalter business (NABTS)," but that: "Plaintiff acknowledged her approval of Burkhalter's transactions totaling $ 217,000 in the Final E state accounting she signed under oath and submitted to the Probate Court **[*14]** in September of

1994." The Court also held that the plaintiff was judicially estopped from "bringing a claim for breach of fiduciary duty" on the sole ground that " 'one who has made oath to a state of facts in a former judicial proceeding' is estopped from contradicting the former statements in a later proceeding."

I. Claims against Ted A. Burkhalter as a Co-Trustee.

The Appellant raises two issues on appeal challenging the trial court's rulings as to the appellant's claims against Ted A. Burkhalter in his capacity as a Trustee. The first is:

Whether the Chancery Court erred in dismissing plaintiff's claim against Ted A. Burkhalter, as Co-Trustee, upon a finding that plaintiff was judicially estopped based upon a sworn accounting filed in the Probate Court?

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n7 During the trial the Court ruled that any questions on punitive damages would be deferred to a bifurcated hearing. As a result of the trial court's rulings and ours, the claim for punitive damages is moot.

Cotter's final accounting, filed **[*15]** with the Probate Court Clerk in September 1994, contains several references to the Verla Doyle Family Trust. Cotter's accounting states, in pertinent part:

> The Trust referred to herein is the Verla D. Doyle Family Trust, Nancy E. Cotter and Ted A. Burkhalter, Co-Trustees. This trust was created January 5, 1994, as a revocable intervivos trust and substantially all of the assets of Verla D. Doyle were received in trust. *All disbursements and transactions in trust have been made in accordance with the trust instrument.* A compli-mentary copy of an internal summary of the trust transactions has been prepared and provided to the Administrator C.T.A. (Emphasis added).

The above immediately precedes Cotter's sworn verification of her accounting.

The two-page summary of the Trust's transactions to which Cotter referred when verifying that "all disbursements and transactions in trust have been made in accordance with the trust instrument" included the following entries under the heading "DISBURSEMENTS":

Ramsey Burkhalter, PC, CPA's $ 14,094.18

Ted A. Burkhalter, Atty & Trustee $ 136,612.16

.....

Investment in NABTS Limited Partnership (incl Absolute Video) **[*16]** $ 170,000.00 n8

Cotter signed the two-page summary of the Trust's transactions when she signed the accounting. In her

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n8 Cotter sought to recover from Burkhalter, Resha and Prudential the NABTS investment and most of the fees paid to Burkhalter and Burkhalter & Ryan. The $ 150,706.35 in total fees were for the legal, accounting, and administrative work Burkhalter and Burkhalter-Ryan performed for Doyle and her Trusts over two years. Cotter later sought Probate Court approval of $6,308.00 in attorneys' fees paid to Burkhalter and $4,994.18 in accounting fees paid to BR&Co. Those amounts were not disputed at trial. Cotter admits that she agreed to the $50,000 loan to Absolute Video, a venture benefitting Cotter's son. Cotter did not dispute either the $50,000 loan or the $170,000 NABTS investment shown on the Trust accounting.

final accounting Cotter stated that she knew Burkhalter was providing the summary of the Trust's transactions to First American Trust Company, which institution the Catholic Charities [*17] had chosen to succeed Cotter as Administrator of Mrs. Doyle's estate. The final accounting included pertinent financial information about the Trust's transactions. Moreover, the record reveals that Burkhalter conferred with Cotter's counsel and obtained both of their agreements prior to circulating the accounting.

Cotter asserts that the estoppel defense is misplaced as a matter of fact, arguing that she never "swore" to the trust accounting. We respectfully disagree upon the basis of the facts shown above and in the record.

Cotter further asserts that the estoppel defense is misplaced as a matter of law, arguing that Rule 803(1.2) of the Tennessee Rules of Evidence, which provides in the final sentence that "Statements admissible under this exception are not conclusive" abolishes the doctrine of judicial estoppel. Cotter cites the comments of the Advisory Commission in support of her argument, which comments state in pertinent part:

The final sentence is intended to abolish the distinction between evidentiary and judicial admissions. Unless made conclusive by statute or another court rule, such as T.R.C.P. 36.02 on requests for admission, all party admissions are simply evidentiary, [*18] not binding, and are subject to being explained away by contradicting proof.

T.R.E. 803(1.2) (Advisory Commission Comments)

Ms. Cotter seeks to be relieved of her sworn statements in a prior, now concluded, civil action, and she seeks to take an inconsistent if not contradictory position in the civil action pending before us. We do not believe Rule 803(1.2) permits such, nor should it be interpreted to permit such. We view Rule 803(1.2) and the Advisory Commission comment as being applicable to "Admissions by Party-Opponent" in a pending case but not to admissions in a "prior" case or "prior" judicial proceeding. The sworn statements by Cotter at issue were presented in a different and now concluded matter, being the civil action against her by the Catholic Charities Case, *First American Trust Co., et al., v. Nancy E. Cotter, et al.*, Civil Action No. 95-57-III, and the related probate administration of the Estate of Verla Doyle. The matter before us is not the administration of the estate of Verla Doyle and it is

not the Catholic Charities Case; it is a civil action brought by Ms. Cotter, individually, and as a Trustee against Ted A. Burkhalter and others. The case before **[*19]** us is admittedly a derivative action to the now concluded Catholic Charities Case, however, it is not the same proceeding and it is now too late for Cotter to set the record straight in that proceeding.

Rule 803(1.2), Advisory Commission Comments notwithstanding, applies to statements made by a party in a pending matter, which rule affords a party, during the pendency of "that" matter, the opportunity to set-the-record-straight before the case (that case) is concluded. This would afford a party, in a pending action (as distinguished from a subsequent action) the opportunity to correct a statement or testimony that may be incorrect, inaccurate, incomplete, etc. before the matter becomes final.

The law of judicial estoppel ordinarily applies to one who has made oath to a state of facts in a former judicial proceeding which he or she undertakes to contradict in a subsequent proceeding. *Decatur Co. Bank v. Duck, 969 S.W.2d 393, 397 (Tenn. Ct. App. 1997)* (defendant estopped to deny secured indebtedness to bank when that denial would contradict a sworn schedule of liabilities defendant

had filed in bankruptcy court).

A general statement of the doctrine of judicial estoppel **[*20]** is that where one states on oath in former litigation, either in a pleading or in a deposition or on oral testimony, a given fact as true, he will not be permitted to deny that fact in subsequent litigation, although the parties may not be the same ....

The doctrine ... rests solely on public policy which exalts the sanctity of the oath. The object is to safeguard the administration of justice by placing a restraint upon the tendency to reckless and false swearing and thereby preserve the public confidence in the purity and efficiency of judicial proceedings.

Melton v. Anderson, 32 Tenn. App. 335, 222 S.W.2d 666, 669 (Tenn. Ct. App. 1948). See also *Gilley v. Jernigan, 597 S.W.2d 313, 318 (Tenn. Ct. App. 1979);* and *Bubis v. Blackman, 58 Tenn. App. 619, 435 S.W.2d 492 (Tenn. Ct. App. 1968)* ("... [A] party cannot be allowed to solemnly take a position in the course of litigation which he thinks is to his advantage, and, then, change this position to another and contrary one when he deems it to his advantage to do so.")

Our Supreme Court has applied the doctrine of judicial estoppel as recently as 1999 in *Marcus v. Marcus, 993 S.W.2d 596, 601 (Tenn. 1999),* **[*21]** an opinion authored by now Chief Justice Drowota. The *Marcus* court noted that "Under the doctrine of judicial estoppel 'a party will not be permitted to occupy inconsistent positions or to take a position in regard to a matter which is directly contrary to, or inconsistent with, one previously assumed by him, ...'" quoting, *Obion County v. McKinnis, 211 Tenn. 183, 364 S.W.2d 356, 357 (1962). Marcus* also noted that the doctrine was "designed to prevent a party from 'gaining an unfair advantage." *Carvell v. Bottoms, 900 S.W.2d 23, 30 (Tenn. 1995)*

Aside from the controlling authority of a Tennessee Supreme Court opinion, it is pertinent to note that the *Marcus* court applied the doctrine of judicial estoppel as recently as 1999. This is pertinent for *Marcus* was published after Rule 803(1.2) was amended. We find this compelling. Moreover, *Marcus* confirms the continued existence and applicability of the doctrine of judicial estoppel, Rule 803(1.2) notwithstanding.

In fairness to the appellant, it should be acknowledged that the scholarly authors of *Tennessee*

Law of Evidence are also of the belief that the last sentence of Rule **[*22]** 803(1.2), (statements admissible under this exception are not conclusive), alters Tennessee law, meaning that the doctrine of judicial estoppel was abolished by Rule 803(1.2). The treatise further states, "This language, ... abolishes the common-law principle that sworn statements in pleadings or testimony - and even unsworn pleadings - were conclusive. Now, under the Tennessee Rules of Evidence, admissions are evidentiary, meaning they are admissible but can be rebutted." *Tennessee Law of Evidence*, § 8.06(10), p. 8-58, 59 (Cohen, Sheppeard and Paine, 4th Ed., 2000). The Fourth Edition, which was published in 2000, emphasizes this point by stating:

Some Tennessee courts, however, apparently still apply the doctrine of judicial estoppel. In *Cardin v. Campbell, 920 S.W.2d 222, 223-24 (Tenn. Ct. App. 1995)* the court held that "where a person states under oath in former litigation, either in pleadings or testimony, that a fact is true, she will not be permitted to deny that fact in subsequent litigation." The *Cardin* court did not mention Rule 803(1.2).

Tennessee Law of Evidence, § 8.06(11)(a), p. 8-59 (Cohen, Sheppeard and Paine, 4th Ed., 2000). **[*23]**

While neither *Cardin* nor *Marcus* mention Rule 803, we nevertheless respectfully disagree with the suggestion that the last sentence under Rule 803(1.2) abolishes the doctrine of judicial estoppel. In our opinion, *Marcus* and *Cardin* correctly state the current law on judicial estoppel, particularly as it concerns a party's testimony in a "prior" matter as distinguished from statements made or testimony given by a party in a matter which is still pending. This is why *Marcus* and *Cardin* are not inconsistent with Rule 803(1.2).

In her sworn final accounting to the Probate Court, filed September 1994, Cotter stated that all disbursements "have been made in accordance with the trust instrument." Cotter's final accounting was a direct result of and was material to the Catholic Charities Case in which Cotter was the principal defendant. To allow Cotter to now change the sworn statement she presented to the Catholic Charities, the beneficiaries of Mrs. Doyle's will, and the Probate Court would violate long standing grounds of public policy and would diminish the sanctity of an oath. *See Sartain v. Dixie Coal & Iron Co., 150 Tenn. 633, 266 S.W. 313, 318 (Tenn. 1924);* **[*24]** cited in *Marcus, 993 S.W.2d at 602.* Accordingly, we find, as the Chancellor found, that it is too late for Cotter to

"correct" or "change" her prior sworn statement, since the action in which the statement was made is now concluded. Accordingly, Cotter is precluded under the doctrine of judicial estoppel from taking a contrary position in this civil action. We therefore affirm the judgment of the Chancery Court on this issue.

The next issue Appellant raises is: Whether the Chancery Court should have entered judgment against Ted A. Burkhalter and Linda Resha for conspiring to divert funds from the trust?

The Memorandum opinion of the Chancery Court entered October 3, 20000, states:

... Plaintiff contends that Burkhalter and Resha conspired to convert funds from the Verla Doyle Family Trust. It is well settled that a conspiracy to defraud requires a common purpose, supported by a concerted action to defraud, that each has the intent to defraud and said intent is common to each conspirator as well as an understanding that the other has the purpose. See 6 *Tenn. Jurisprudence*, Conspiracy, Section 3, page 366. After careful review of all the facts and the testimony at trial, it is clear **[*25]** that Resha had no knowledge of Burkhalter's intentions

regarding the funds. Nor, did she have an individual intent to defraud or convert monies from the Trust. *Id.* at page 4.

Resha testified that she had no knowledge of Burkhalter's action or plans. Moreover, Resha testified that she had no fraudulent intent, nor did she have knowledge of any improprieties. Resha's testimony is supported by Burkhalter. More importantly, there is no direct or compelling evidence to the contrary.

The trial court heard this matter without a jury. Therefore, our review of the findings of fact by the trial court is *de novo*, accompanied by a presumption of correctness. Tenn. R. App. P. 13(d). Accordingly, we will affirm the trial court's decision unless an error of law affecting the result has been committed or unless the evidence preponderates against the trial court's findings of fact. *Roberts v. Robertson County Board of Education, 692 S.W.2d 863, 685 (Tenn. Ct. App. 1985),* citing *Willis v. Smith, 683 S.W.2d 682, 687-88 (Tenn. Ct. App. 1984).* In conducting our review of the trial court's decision, we are also mindful that the trial court's findings based **[*26]** upon its own determination of the credibility of the witnesses and upon disputed evidence should be given great weight by this Court and should not be

disregarded unless there is clear, concrete and convincing evidence to the contrary. *APCO Amusement Co. v. Wilkins Family Restaurants of America, Inc., 673 S.W.2d 523, 529 (Tenn. Ct. App. 1984).*

Our review of the facts establishes that there is more than ample evidence to support the trial judge's findings. Accordingly, we affirm on this issue.

II. Issues pertaining to Prudential Securities, Inc.

The issues pertaining to Prudential Securities are whether the Chancery Court erred in overruling plaintiff's motion for summary judgment against Prudential Securities and, conversely, in sustaining Prudential Securities' motion for summary judgment, which summary judgment dismissed plaintiff's claims against Prudential Securities based upon written agreements with the Co- Trustees?

The trial court disposed of the claims against Prudential on summary judgment. The standards for this court's review of a trial court's grant of summary judgment are well-settled. Tenn. R. Civ. P. 56.04 states that summary judgment **[*27]** is appropriate

where: (1) there is no genuine issue with regard to the material facts relevant to the claim or defense contained in the motion, *see Byrd v. Hall, 847 S.W.2d 208, 210 (Tenn. 1993);* and (2) the moving party is entitled to a judgment as a matter of law on the undisputed facts. *See Anderson v. Standard Register Co., 857 S.W.2d 555, 559 (Tenn. 1993).*

This court must view the evidence and all reasonable inferences in the light most favorable to the non-moving party. *Byrd, 847 S.W.2d at 210-11.* When both the facts and conclusions to be drawn therefrom permit a reasonable person to reach only one conclusion, the trial court's decision granting summary judgment should be upheld. *McCall v. Wilder, 913 S.W.2d 150, 153 (Tenn. 1995); Carvell, 900 S.W.2d at 26.*

The fundamental issues pertaining to a summary judgment motion are: (1) whether a factual dispute exists; (2) whether the disputed fact is material to the outcome of the case; and (3) whether the disputed fact creates a genuine issue for trial. *Byrd, 847 S.W.2d at 214.* A fact is "material" for summary judgment purposes, **[*28]** if it "must be decided in order to resolve the substantive claim or defense at which the

motion is directed." *Luther v. Compton, 5 S.W. 3d 635, 639 (Tenn. 1999).*

Ms. Cotter sets forth numerous arguments concerning Prudential and the Family Trust; yet, the simple issue for this Court to determine is whether Prudential's acts or omissions constituted a breach of a duty. Accordingly, we must ascertain what duties existed and whether they were or were not breached.

Cotter's claims are based on Prudential's alleged breach of fiduciary duty in handling the assets of the Family Trust. Prudential denies that it was a fiduciary with respect to the accounts maintained by the Family Trust. Courts in other jurisdictions have held that brokerage firms maintaining non-discretionary accounts do not assume broad fiduciary duties to their customers. *See e.g. Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Cheng, 901 F.2d 1124 (D.C. Cir. 1990); Leib v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 461 F. Supp. 951* (D.C. Mich., 1978).

The dispute between the Appellant and Prudential essentially involves the interpretation of the various agreements. **[*29]** The rules concerning the interpretation of written agreements are clear. Where the agreement is plain and unambiguous, its meaning

is a question of law, and it is the court's function to interpret the agreement according to its plain terms. *Petty v. Sloan, 197 Tenn. 630, 277 S.W.2d 355 (1955).* The language must be taken and understood in its plain, ordinary, and popular sense, *Bob Pearsall Motors, Inc. v. Regal Chrysler-Plymouth, Inc., 521 S.W.2d 578 (Tenn. 1975),* and the words expressing the parties' intentions should be given the usual, natural, and ordinary meaning. *Ballard v. North American Life & Cas. Co. 667 S.W.2d 79 (Tenn. Ct. App. 1983).* If the language of a written instrument is unambiguous, the court must interpret it as written rather than according to the unexpressed intention of one of the parties. *Sutton v. First Nat. Bank of Crossville, 620 S.W.2d 526 (Tenn. Ct. App. 1981).*

At the time the Family Trust account was opened at Prudential, Cotter executed, *inter alia*, a form entitled Fiduciary Certification of Investment Powers. The Fiduciary Certification, in pertinent part, provides:

In consideration **[*30]** of your opening and maintaining one or more accounts for the trust, pension, profit sharing plan, estate or other entity named below, I or we, the undersigned fiduciary or fiduciaries, as applicable, certify as follows:

***(4) This certification authorizes you to accept orders and other instructions relative to the account or accounts as titled above from those individuals or entities named below. *This includes, but is not limited to, authorization to buy, sell or hold securities and to receive and disburse monies.* The individuals named may execute any documents which you may require relevant to the opening or maintaining of the account or accounts. Any documents executed by any of the listed fiduciaries shall be conclusive evidence that the fiduciary is authorized to enter into the transactions contemplated by such document(s). *Unless it is specified otherwise, any of those listed below may individually act on behalf of the account or accounts*: (emphasis added).

The Fiduciary Certification served as written delegation by Cotter of power over the Family Trust. Prudential relied on the appellant's execution of the fiduciary Certification in allowing one Trustee to direct **[*31]** the disbursement of funds.

In addition to the Fiduciary Certification, Cotter also signed and consented to the use of Letters of Authorization through which either Trustee could order the disbursement of funds. The Letters of Authorization serve as further evidence that

Prudential could rely solely on Burkhalter's instructions as to the disbursement of funds from the account. The Letters of Authorization were pre-signed by both Cotter and Burkhalter to be kept and used by Prudential. By executing the Fiduciary Certification, Cotter agreed that Burkhalter alone could authorize disbursements from the Prudential account.

The undisputed material facts are: (1) the appellant signed a Fiduciary Certification which allowed Prudential to rely on Burkhalter's instructions in disbursing funds from the Family Trust, (2) the appellant authorized Prudential to disburse funds from the account through the execution of pre-authorized Letters of Authorization, (3) the Trust Instrument expressly allowed the appellant to delegate authority over the account, and (4) the appellant gave sworn testimony in a Probate Court proceeding that all actions related to the Family Trust were taken in accordance **[*32]** with the terms of the Trust Instrument.

The various documents relevant to the Family Trust clearly authorized Burkhalter to act alone in directing the disbursement of funds. Not only was Burkhalter authorized to act alone, the authorization for him to do so came from the Cotter. Moreover, the

Trust Instrument, the very document upon which Cotter relies, authorized the delegation of these powers and allowed Prudential to accept such a delegation.

Cotter's arguments as to the manner in which Burkhalter used the funds are irrelevant to Prudential's liability. By signing the Letters of Authorization, Cotter consented to their use. Even if Burkhalter misused the Letters of Authorization, Prudential breached no duty in disbursing funds pursuant to the validly executed Letters of Authorization.

Therefore, it is our conclusion that Prudential did not breach any duty to Cotter or the Trust when relying on Burkhalter's instructions in disbursing funds from the account. Accordingly, the trial court's decision granting Prudential's motion for summary judgment and denying the appellant's motion for summary judgment should be affirmed.

[*33] III. Malpractice Claim against Burkhalter Ryan & Co., P.C. and Ted A. Burkhalter.

The issue pertaining to the malpractice claim against Ted A. Burkhalter and Burkhalter-Ryan n9 is whether the Chancery Court erred by sustaining the motions for summary judgment of Ted A. Burkhalter

and Burkhalter-Ryan which dismissed plaintiff's professional liability claims against both defendants upon the statute of limitation defense?

The standard of review for summary judgment has been addressed above and shall not be restated.

A professional malpractice claim must be filed within one year of when the claim accrued. *Tenn. Code Ann. § 28-3-104(a)(2).* What is usually disputed, and what is seldom clear, is when did the plaintiff know or when should the plaintiff have **[*34]** reasonably known that a claim accrued. The Chancellor held that the claim accrued more than one year before April 8, 1997, the date Cotter filed suit on behalf of the Trust. The Estate, as distinguished from the Trust, arguably did not assert its claim until four months after Cotter filed suit. It was not until August 20, 1997 that the Estate became a plaintiff. That is the

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n9 Burkhalter-Ryan, the accounting firm, asserts that the services rendered by Ted Burkhalter were legal services, those of an attorney, not those of an accountant. Burkhalter-Ryan asserts that such services were not within his scope of duties as an accountant with the firm.

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date on which the Chancery Court granted Cotter's motion to substitute the Estate for the Trust. n10

[A] cause of action accrues when the plaintiff knows or in the exercise of reasonable care and diligence should know that an injury has been sustained as a result of wrongful or tortious conduct by the defendant ....

An actual injury occurs when there is the loss of a legal right, remedy or interest, or the imposition of a liability ....

An actual injury may also take the form of the plaintiff being forced to take some action or otherwise suffer "some **[*35]** actual inconvenience," such as incurring an expense, as a result of the defendant's negligent or wrongful act.

John Kohl & Co. v. Dearborn & Ewing, 977 S.W.2d 528, 532 (Tenn.1998).

This malpractice action was filed on April 8, 1997 following issuance of the Internal Revenue Service

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n10 As noted earlier, the appellant does not list the estate as an appellant.

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estate tax assessment, known as the "90-day letter," on April 4, 1997, seeking to recover losses allegedly suffered by the Doyle Family Trust, as the holder of substantially all assets of the late Verla D. Doyle, as the owner of such assets and the sufferer of all consequences of tax liabilities of the Estate of Verla D. Doyle. The losses are alleged to have been caused by estate and inheritance tax liabilities increased by negligence of Burkhalter and his accounting firm Burkhalter-Ryan, and Burkhalter's drafting of the estate planning and trust instruments at issue and his acts of approving these as adequate to achieve deductions.

To determine whether the Chancellor correctly ascertained when the cause of action accrued, and when the plaintiff knew or should have know that a cause of action had accrued, it is important to review the relevant chronology. The most pertinent dates **[*36]** are April 8, 1996, being one year before Cotter filed this lawsuit on behalf of the Trust, and August 20, 1996, being one year before the Estate was substituted a s plaintiff and asserted its malpractice claim):

Dec. 1992 Doyle signs the Exemption Trust instrument.

Jan. 1993 Doyle signs the Family Trust instrument.

Apr. 1993 Doyle dies.

July 1994 Burkhalter files the Estate's federal and state tax returns, which Cotter signs on behalf of the Estate.

Aug. 1994 The Estate's successor administrator, First American Trust Company, questions Burkhalter's deduction of the Edgar Doyle settlement payment on the Estate's tax returns. Burkhalter responds in a letter that, if the Administrator believed the deduction improper, it should "immediately file an amended return with the IRS to minimize the accrual of interest on the additional taxes."

Aug. 1995 Lawyers for the Estate's successor administrator, First American, decide that one or both trust instruments are defective and research whether the Estate should bring a malpractice claim.

Sep. 1995 The IRS requests that the Estate of Verla Doyle produce the trust instruments and any documentation substantiating the Edgar Doyle settlement **[*37]** so that the IRS may review them as

part of its examination of the Estate's return.

Dec. 1995 The IRS conducts an on-site audit of the Estate's tax return. A lawyer for the Estate's administrator attends.

Apr. 1996 The IRS gives the Estate a "draft" copy of the IRS's adjustments to the Estate's return and meets with the administrator's lawyers.

June 1996 The administrator's lawyers begin settlement discussions with the IRS.

This chronology shows that by April 8, 1996:

(1) the Estate's successor administrator had challenged Burkhalter on deducting the Edgar Doyle settlement payment;

(2) the administrator's lawyers had decided that either or both trust instruments were so defective that they could not be defended in good faith if challenged by the IRS, and those same lawyers researched a possible malpractice claim against Burkhalter;

(3) as part of its audit, the IRS had requested the Estate's tax return, trust instruments, and other documentation pertaining to the Edgar Doyle

settlement; and

(4) after the on-site audit, the IRS had discussed with the administrator's lawyers problems with the Estate's tax return.

The chronology also shows that the Estate gained still **[*38]** more knowledge by August 20, 1996, one year before the date on which the Estate became a plaintiff in this case and first began to assert its malpractice claim.

A lawyer's knowledge of an alleged malpractice is attributable to the estate. *See Wilkins v. Dodson, Parker, et. al., 995 S.W.2d 575, 584 (Tenn. Ct. App. 1998)* (lawyer's knowledge imputed to client for purposes of determining when claim accrued). Accordingly, the plaintiff's malpractice claim is time-barred for the knowledge (of the alleged malpractice) of the lawyers for the administrator is attributable to the Estate.

Accordingly, we affirm the trial court on this issue.

In Conclusion

For the reasons set forth above, the judgment of the Chancery Court is affirmed in all respects. This cause is remanded to the Chancery Court of Davidson County for any necessary further proceedings consistent with this opinion.

Costs of this appeal are taxed against Appellant, Nancy E. Cotter, individually, and as Trustee of the Verla Doyle Family Trust, and as Executrix of the Verla Doyle Estate, for which **[*39]** execution may issue if necessary.

FRANK G. CLEMENT, JR., SPECIAL JUDGE

IN THE
CHANCERY COURT FOR THE
STATE OF TENNESSEE

TWENTIETH JUDICIAL DISTRICT,
DAVIDSON COUNTY, PART ONE

NANCY E. COTTER, Individually, and as Trustee
of
THE VERLA DOYLE FAMILY TRUST,
Plaintiff,

vs.

TED AUSTIN BURKHALTER,
Individually, and as a Principal of
Burkhalter Ryan Co., P.C.,
A Professional Corporation,
PRUDENTIAL SECURITIES, INCORPORATED,
BURKHALTER-RYAN CO., P.C.
A Professional Corporation, and NABTS,
A Professional Corporation,
LINDA L. RESHA and TED BURKHALTER
and BART BIBREL,
Defendants.

MEMORANDUM

This matter is before the court on plaintiff Nancy E. Cotter's (hereinafter, "plaintiff") complaint against defendant Ted Austin Burkhalter (hereinafter "Burkhalter") for breach of fiduciary duty and both Burkhalter and defendant Linda L. RESHA (hereinafte, "Resha") for conspiracy to convert. Thus, the issues are (1) whether Burkhalter breach his fiduciary duty to plaintiff and (2) whether Burkhalter and Resha conspired to convert funds from the Verla Doyle Family Trust.

Procedural History

Plaintiff Nancy E. Cotter filed suit against Ted Austin Burkhalter and his corporation, Burkhalter Ryan Co., P.C. (hereinafter "Burkhalter"), Prudential Securities Incorporated (hereinafter, "Prudential"), Linda Resha (Hereinafter "Resha") and Bart Sibrel (hereinafter "Sibrel"). She alleged six counts- (1) Breach of Fiduciary duty as to Prudential; (2) Conversion as to Prudential; (3) Breach of Fiduciary Duty as to Burkhalter; (4) Conversion as to Burkhalter and Resha; (5) Malpractice as to Burkhalter and; (6) Fraudulent Possession as to Sibrel.

In a July 20, 1998 order this court granted a motion for a separate trial on Count Six (6) of the Complaint dismissing Sibrel from this action. Subsequently, in a May 21, 1999 order this court granted

summary judgment in favor of Burkhalter dismissing Count Five (5) of the Complaint alleging malpractice. In a February 4, 2000 order this court granted summary judgment in favor of Prudential dismissing Counts One (1) and Two (2) alleging breach of fiduciary duty and Conversion against Prudential, respectively, from the Complaint.

Therefore, only County three (3) and four (4) alleging Breach of Fiduciary Duty against Burkhalter and Conversion against both Burkhalter and Resha remain.

Findings of Fact

1. Burkhalter was the lawyer for the Estate of Verla Doyle. Defendant Burkhalter and Plaintiff Cotter were made co-trustees of the Verla Doyle Family Trust.

2. Resha and Burkhalter had an interest in a bookkeeping business by the name of Nashville Area Bookkeeping and Tax Service (NABTS).

3. In Burkhalter's capacity as co-trustee, he made withdrawals from the trust on at least four different occasions. Portions of the proceeds of these withdraw3als were deposited into the Resha//Burkhalter business (NABTS).

4. These transactions were accomplished by Burkhalter making the withdrawals on the trust fund account.

5. Plaintiff acknowledged her approval of Burkhalter's transactions totaling $217,000 in the Final Estate accounting she signed under oath and submitted to the Probate Court in September of 1994.

ISSUES

I. Whether Burkhalter breach his fiduciary duty to plaintiff by wrongfully diverting funds from the Verla Doyle Family Trust?

II. Did Burkhalter and Resha conspire to convert monies from the Verla Doyle Family Trust?

Conclusions of Law

I. Whether Burkhalter breach his fiduciary duty to plaintiff by wrongfully diverting funds from the Verla Doyle Family Trust?

Plaintiff contends that Burkhalter breach his fiduciary duty to plaintiff by wrongfully diverting funds totaling $210,000 from the Verla Doyle Family Trust without her knowledge or authority. Burkhalter submits, however, that plaintiff was fully aware of the transactions and in fact acknowledged awareness of the transactions in the Final Estate accoounting she signed and submitted to the Probate Court in September of 1994. Therefore, Plaintiff should be judicially estopped from bringing a claim for breach of fiduciary duty.

It is well settled that "one who has made oath to a state of facts in a former judicial proceeding" is judicially estopped from contradicting the former statements in a later proceeding. *Decatur Co. Bank v. Duck,* 969 S.W.2d 393, 397 (Tenn.Ct.App. 1997). Plaintiff signed an accounting which lists the disbursements she now contends were without her knowledge or authority. (Exhibit 10) In addition, the trust instrument authorizes Burkhalter as a co-trustee to make such withdrawals.

Therefore, after careful review of all the evidence in the record, this court is of the opinion that plaintiff is judicially estopped from contending that she had no knowledge of the aforementioned transactions.

II. Did Burkhalter and Resha conspire to convert monies from the Verla Doyle Family Trust?

In addition, plaintiff contends that Burkhalter and Resha conspired to convert funds from the Verla Doyle Family Trust. It is well settled that a conspiracy to defraud requires a common purpose, supported by a concerted action to defraud, that each has the intent to defraud and said intent is common to each conspirator as well as an understanding that the other has the purpose. See 6 Tenn.Juris.-Conspiracy, § 3, page 366. After careful review of all the facts and the testimony at trial it is clear that Resha had no knowledge of Burkhalter's intentions regarding the funds. Nor did she have an individual intent to defraud or convert monies from the trust.

Therefore, after careful consideration of all the facts in the record, plaintiff's complaint is dismissed in its entirety.

Defendant Burkhalter's attorney and Defendant Resha's attorney shall prepare an order consistent with this memorandum opinion. Plaintiff is taxed with costs.

/s/ Irvin H. Kilcrease, Jr.
IRVIN H. KILCREASE, JR.
CHANCELLOR

cc: James W. Mondelli, Esq.
D. Alexander Fardon, Esq.
Paul T. Housch, Esq.
Carrol D. Kilgore, Esq.

Excerpt, Transcript of Trial Proceedings, July 10-12 and 17, 2000, Oral Findings Made upon Defensive Motion to Dismiss at the Close of Plaintiff's Proof, Transcript filed January 31, 2001

IN THE CHANCERY COURT OF DAVIDSON COUNTY, TENNESSEE, AT NASHVILLE

NANCY E. COTTER, Individually,
and as Trustee of the Verla Doyle Family Trust,
Plaintiff

vs.

No. 97-1181-I

TED AUSTIN BURKHALTER, et al.,
Defendants

Before: Hon. Irvin H. Kilcrease, Jr.
Chancellor presiding

* * *

FILED
Jan 31 2001
Clerk of the Court

"THE COURT: Well, in consideration of the arguments of the defendant Burkhalter and the defendant Resha to dismiss some of the claims against it, Mr. Burkhalter asks the Court to dismiss the claims against him on the basis of judicial estoppel. He takes the position that Mrs. Cotter takes a different position in this court than she did in the Probate Court by signing the document under oath.

"This Court has already considered this matter once for summary judgment and determined at that point that there was a genuine issue of material fact, and therefore the motion for summary judgment was denied. Now Mrs. Cotter has testified in the matter, and given that testimony in effect that she signed the informal document, called informal, but it was signed under oath. And she has testified that she relied upon Mr. Burkhalter, who is an attorney and also an accountant. And, of course, the document itself was prepared by Mr. Burkhalter.

> "Mr. Burkhalter now takes the position that she's estopped to deny the accuracy of the document filed in Probate Court. The Court's of the opinion and finds in this case that Mrs. Cotter completely relied on Mr.

> Burkhalter, who had the superior knowledge as attorney and CPA, had prepared the document, and he inserted the clause or the paragraph in that document stating that, in fact, that all of the disbursements listed above Mrs. Cotter's signature were true. The Court's of the opinion that this is not a – that the motion for – the motion to dismiss against Mr. Burkhalter is not well taken, therefore it's denied."

(Trial Transcript, Vol. VI, pp. 302, line 1 – 303, line 11)